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PARENTAL RIGHTS AND THE STATE REGULATION OF RELIGIOUS SCHOOLS

*Matthew Steilen**

ABSTRACT

In *Wisconsin v. Yoder*, the United States Supreme Court invalidated convictions of several Amish parents for removing their children from school in violation of state mandatory attendance laws. In reaching its decision, the Court argued that protecting the Amish parents' decisions fit into a long-standing American tradition of giving parents control over the upbringing of their children. Yet the Supreme Court mischaracterized the history of parental rights and state interests in education. Contemporary historical research shows that parents have long ceded a large measure of control to the state in the education of their children. Still, very little has been written about this scholarship in legal journals. This article attempts to remedy this deficiency. It isolates and explores three key periods in the development of state-administered public schools, paying special attention to early public funding of religious schools, the Protestant character of the common schools, and Catholic resistance to the use of the King James Bible in common schools. In so doing, this article argues for a "republican" interpretation of early educational practices. Drawing on that interpretation, the article joins a debate between Noah Feldman, Martha Nussbaum, and others about the nature of American religious liberties, and argues that their views are not able to fully acknowledge the history of Protestant evangelizing in public schools.

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I. INTRODUCTION

A. The Legal Use of Educational History

In *State v. Whisner*, the Ohio Supreme Court considered the case of twelve parents indicted by a grand jury for violations of a state education law that required parents to send their children to schools that conformed to "minimum standards" established by the State Board of Education.¹ The parents had enrolled their children in Tabernacle Christian School, a "Bible oriented" school that employed the Accelerated Christian Education program, or "A.C.E." In the A.C.E. curriculum, students work on their own through a series of workbooks.² The school principal, Reverend Levi Whisner, headed the Tabernacle Christian Church, a church "not tied to any religious system," but based on the idea that one could be "born again" into "a life separate from sin."³ Tabernacle aimed to impart these beliefs to the parish children.

At trial, the parents testified that they sent their children to Tabernacle because it was the only school in the area that provided a "sound education in an atmosphere . . . compatible with . . . Christian beliefs."⁴ In contrast, the parents said local public schools had suffered a "moral breakdown," and they could not in good conscience send their children there.⁵ One mother testified that sending her children to public school would be failing her duty to provide her children with the "best education possible."⁶ At the conclusion of trial, the parents moved for acquittal, arguing that Ohio's compulsory attendance statute, as applied to them, violated their right and their children's right to the free exercise of religion under the First Amendment.⁷ The trial court denied the motion. The parents were convicted and the conviction was upheld on appeal.

The Supreme Court of Ohio reversed. It held that Ohio's compulsory attendance law substantially burdened the

1. *State v. Whisner*, 351 N.E.2d 750, 753, 764 (1976).

2. *Id.* at 752, 755-56.

3. *Id.* at 754-55.

4. *Id.* at 756.

5. *Id.*

6. *Id.*

7. *Id.* at 757-58.

defendants' religious practices, implicating the Free Exercise Clause under the rule of *Wisconsin v. Yoder*.⁸ The court's focus was on the substance of the "minimum standards" requirement. Among other things, the standards required Ohio schools to obtain state-issued charters, to submit to inspection before a charter was issued, to allocate the entire instructional time to various secular subjects, and to conform all school activities to policies adopted by the board of education.⁹ In addition to the standards, Ohio law included a section entitled "Interpretative and Explanatory Information," which contained principles to guide school administrators in conforming to the minimum standards.¹⁰ These provisions specified, for example, that "common problems are solved through the consensus of thinking and action of individuals in the group;" that "[o]rganized group life of all types must act in accordance with established rules of social relationships and a system of social controls;" and that a child's health is the "single greatest factor in the development of a well rounded personality."¹¹

While the Ohio Supreme Court criticized several of the minimum standards and interpretative principles, it focused its attention on the requirement that Ohio schools conform *all* of their activities to school board policies.¹² According to the court, it would be impossible for a religiously neutral school board to regulate all the activities of Tabernacle, since those would necessarily include religious activities. A board regulating all school activities would be compelled to take positions that favored some religious practices and disfavored others.¹³ Furthermore, the court held that the minimum standards were so extensive that requiring Tabernacle to comply with all of them would "eradicate the distinction between public and non-public education, and thereby deprive these appellants of their traditional interest as parents to direct the upbringing and education of their children."¹⁴ In these ways, the regulations imposed an undue burden on the

8. *Whisner*, 351 N.E.2d at 764.

9. *Id.* at 762 (citing EDb-401-02 (1976)).

10. *Id.* at 750, 752-53.

11. *Id.* at 763 (quoting EDb-401-03(b) (1976)).

12. *Id.* at 765-66.

13. *Id.* at 766. As the court hints, this result could also be analyzed as a violation of the Establishment Clause requirement of neutrality, or no excessive entanglement.

14. *Whisner*, 351 N.E.2d at 768.

parents' ability to exercise their genuinely held religious beliefs. Under *Yoder* and other cases, only a compelling state interest could justify such an infringement. The court found no such compelling interest underlying the minimum standards. The burden imposed by the law was so severe, the court said, it was "difficult to imagine" what state interest could possibly suffice.¹⁵ The court concluded that the state could not infringe upon the parents' educational rights through the use of the minimum standards.

The reasoning of the Ohio Supreme Court in *Whisner* was by no means unusual.¹⁶ In large part, the court followed the reasoning of the United States Supreme Court, which has long recognized the right of parents to control the education of their children. In 1923, the Court, in *Meyer v. Nebraska*, struck down a state statute criminalizing instruction in a foreign language, holding that the Due Process Clause of the Fourteenth Amendment protected the right of parents to educate their children.¹⁷ Two years later, in *Pierce v. Society of Sisters*, the Court reaffirmed this reasoning, striking down an Oregon compulsory attendance statute that, in effect, rendered private education unlawful.¹⁸ Characterizing its earlier decision in *Meyer*, the Court observed:

[W]e think it entirely plain that the [Oregon] Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹⁹

Both *Meyer* and *Pierce* found constitutional support for parental educational rights in the Fourteenth Amendment's Due Process Clause. Almost twenty years later, in *Prince v. Massachusetts*, the Court found support in a new source, the First Amendment, applied to the states through

15. *Id.* at 771.

16. See, e.g., *Miller v. Catholic Diocese of Great Falls*, 728 P.2d 794 (Mont. 1986); see also *Braintree Baptist Temple v. Holbrook Pub. Sch.*, 616 F. Supp. 81 (D. Mass. 1984); RALPH D. MAWDSLEY, *LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS* 207-11 (2006); Julie Underwood O'Hara, *State Accreditation of Non-Public Schools: Quality Regulations and the First Amendment*, 1 ED. LAW REP. 5, 5-10 (1982).

17. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

18. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

19. *Id.*

incorporation.²⁰ The petitioner in *Prince* sought to overturn her conviction in state court for furnishing a child with religious leaflets with knowledge that the child would distribute them.²¹ Although the *Prince* Court ultimately rejected the petitioner's constitutional challenge, it recognized that both religious and educational liberty interests were at stake. This provided a new legal foundation for parental rights and gave parents an additional means of attacking regulations.²²

One such attack proved successful in *Wisconsin v. Yoder*.²³ In *Yoder*, the Court upheld an order of the Wisconsin Supreme Court reversing judgment against Amish parents for violating the state compulsory attendance law.²⁴ The parents had withdrawn their children from school after eighth grade, reasoning that the values taught in school were contrary to Amish religious beliefs and that attendance there was contrary to the Amish way of life. When the schools complained, the state charged, tried and convicted the parents, fining them each five dollars. In defense, the parents asserted that Wisconsin's compulsory attendance statute violated their parental rights, as protected by both the First and Fourteenth Amendments.²⁵ The Supreme Court agreed.²⁶ It characterized parental educational rights as a form of religious liberty, and concluded that these rights were due the same consideration afforded free exercise rights—rights which had trumped competing state interests since “[l]ong before” anyone acknowledged a need for public education. In the words of the Court,

Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been

20. *Prince v. Mass.*, 321 U.S. 158, 165–66 (1944).

21. *Id.* at 160.

22. At the time of *Prince*, parents had been making religious arguments against state educational regulations for almost ninety years, but mostly to state courts, and with limited success.

23. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

24. *Id.* at 234.

25. *Id.* at 207–09.

26. *Id.* at 236.

zealously protected, sometimes even at the expense of other interests of admittedly high social importance.²⁷

The state interest in education, the Court said, was no different. Where parents chose an education for their children that functioned to transmit and preserve a particular religious way of life, the choice was protected by the Free Exercise Clause—even at the expense of contrary state interests.²⁸ Indeed, to permit otherwise would give the state, not the parents, a “large measure [of] influence” over a child’s religious future.²⁹ In the Court’s view, no historical support existed for such an outcome, which would run contrary to rights established “beyond debate” in this country: “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”³⁰

The *Whisner* decision fits snugly into this line of cases. *Whisner*, like *Yoder*, accords a “traditional” status to parental interests in directing the education of children.³¹ In contrast, state interests in regulating education, although significant, are relatively newfound.³² Because parents have long directed the education of their children, state regulations that unduly burden this interest must withstand strict scrutiny.³³ To be sure, *Whisner* differs from *Yoder* in a crucial respect. In *Yoder*, the Court considered only Wisconsin’s interest in mandating secondary education until age sixteen, an interest the Court found less significant than the state interest in primary education.³⁴ Yet, this difference goes only to the strength of the

27. *Id.* at 214.

28. *Id.* at 215–19.

29. *Id.* at 232.

30. *Id.*

31. *Whisner*, 351 N.E.2d at 768.

32. *See Yoder*, 406 U.S. at 225–26.

33. *See Whisner*, 351 N.E.2d at 771, 771 n.17; *Yoder*, 406 U.S. at 214.

34. *See Yoder*, 406 U.S. at 226–28. More precisely, the *Yoder* Court narrowed the state interest in question to the interest in mandating secondary education between eighth grade and age sixteen, since the respondents had all attended eighth grade and Wisconsin law required school attendance only until age sixteen. In contrast, in *Whisner*, the Ohio Supreme Court was concerned with the state’s interest in regulating the education of all school-age children. *See Whisner*, 351 N.E.2d at 751 (describing regulations in question).

state's interest, not to the appropriate level of scrutiny³⁵—the latter being a much more significant determination. In contrast, the *Yoder* Court's view that parents had long enjoyed control over the education of their children appears to have supported the application of strict scrutiny.³⁶ The *Whisner* court seems to have employed the history to much the same end.³⁷

Educational history figures centrally in the Supreme Court's analysis of conflicts between parents and the state over religious education. Yet, the Court's discussion of history is significantly flawed.³⁸ It is true that, as Justice Burger noted, parents have long played the central role in directing the upbringing of their children. At this level of generality, the proposition is surely correct. The weakness of the claim is in the details. As a closer look at the history of education shows, parents have long ceded important aspects of control over education—even religious education—to the state. This suggests that state regulations of religious education deserve less exacting scrutiny from courts.

For example, the *Yoder* Court was incorrect in stating that the Free Exercise Clause protected rights of conscience long before any perceived need for universal formal education.³⁹ Several of the country's founders, including Jefferson,

35. See *Yoder*, 406 U.S. at 225–26 (weighing state interest after articulating standard in part I of the opinion).

36. See *id.* at 213–14.

37. See *Whisner*, 351 N.E.2d at 768, 771.

38. I do not mean to suggest that the Court's discussion of the history of education was uniformly wrong. At least some of what it said about educational practices and state interests in education is correct. The errors relate to the Court's discussion of parental interests.

39. See *Yoder*, 406 U.S. at 215. The support for this claim and the others in this paragraph will be laid out in detail in Part II.A, *infra*. Regarding a system of public education, Jefferson introduced a bill into the Virginia legislature in 1778 proposing a system of education that included primary and secondary schools. At roughly the same time, he proposed a *Bill for Establishing Religious Freedom*, an important forerunner of the federal Free Exercise Clause. The Supreme Court made note of Jefferson's interest in common schooling in *Yoder*, but dismissed it on the grounds that Jefferson had not supported mandatory attendance laws. See *Yoder*, 406 U.S. at 226 n.14. Yet compulsory attendance statutes were hardly the only way states interfered with parental educational choices; nearly every plank of the common school reform divested parents of control, including textbook reform (families previously had their own textbooks), teacher credentialing, and public funding. See *infra* Part III.B. Moreover, Jefferson is significant, not as a proponent of mandatory public education, but because he articulated the reasons a democracy has an interest in universal formal education. See *infra* Part II.B. These reasons tend to justify compulsory attendance statutes, whether Jefferson himself supported such laws or not.

perceived the need for universal formal education (including secondary education), expressed that need on many occasions, and actively supported plans in state legislatures and Congress in pursuit of that goal.⁴⁰ While Jefferson ultimately failed to push through much of his system, a later generation of reformers succeeded, still decades *before* the First Amendment was applied to protect the religious educational choices of parents.⁴¹ The Supreme Court thus inverted the order of events; states regulated religious education long before the First Amendment was applied to protect parental choices from state interference.

More generally, the history of American education shows that we have neither a tradition of absolute parental control over education, nor a tradition of absolute state control. Although parents have long had *some* control over what their children learn, for how long they learn, and from whom they learn, states have long sought to appropriate some of this control, restricting what is learned, for how long, from whom, and at whose expense. States have done this because of the importance they have long attached to education. The most striking example of state appropriation of control over education is the creation of the common schools in the nineteenth century.⁴² The intense social changes of that time, including immigration and urbanization, led Americans to look to universal education as a means of ensuring social stability.⁴³

40. See *infra* Part II.A.

41. See *infra* Parts III & IV. Here, I refer to the common school reformers. The common school movement, which they led, began in the 1830s and continued throughout the nineteenth century. As we will see, the curriculum of the common schools was religious, yet the schools were regulated by the states. In contrast, the Supreme Court did not suggest that the First Amendment imposed a limit on state regulation of religious education until *Prince*, in the 1940s. *Prince*, 321 U.S. at 165–66. This is over 100 years after the birth of the common schools. The discrepancy cannot be explained entirely by the date of incorporation of the Religion Clauses. Even in *states* whose constitutions possessed similar provisions protecting religious liberty, lawsuits challenging the religious content of state school curricula were rare in the nineteenth century. DAVID TYACK, THOMAS JAMES & AARON BENAVID, LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954 163 (1987). The first notable state-court challenge of Bible reading occurred in the 1850s, and there were only twenty-five such suits over the seventy year period from 1854 to 1924. *Id.* Below, I analyze one of the earliest such successful suits, *Cincinnati Board of Education v. Minor*, 23 Ohio St. 211 (1872). See *infra* Part IV.B.

42. See *infra* Part III.B.

43. See *infra* Part IIIB.; see *infra* note 44. The social changes I refer to are primarily the rise of cities and the influx of Catholic immigrants. These changes instigated concerns about stability.

Many reformers argued that the state should use schools to “Americanize” newly-arrived immigrants—a practice clearly intended to interfere with the efforts of parents to pass on ethnic, cultural and religious traditions.⁴⁴ To that end, school curricula included explicit religious content.⁴⁵ These schools were funded at least in part by public monies.⁴⁶

History also shows that the concepts we use today to analyze legal, education-related conflicts between parents and the state are relatively new. Many early educational practices do not fit neatly into contemporary legal categories. For example, the distinction between public and private education, so central today, simply did not exist until the 1830s.⁴⁷ Nor were conflicts between parents and the state typically conceived of as *legal*—they were *political* conflicts and resolved at the ballot box or in state legislatures.⁴⁸ Where legal conflicts did emerge, “parental rights” lacked constitutional significance. Although courts at common law recognized a parental right to control the education of children, those rights could be abrogated by acts of the legislature,⁴⁹ and the assertion that parental rights were a trump against state regulation did not emerge until the end of the nineteenth century.⁵⁰ This suggests that it is inaccurate to characterize parental rights as “traditional” in contrast to the powers of the state.⁵¹

This article attempts to illustrate the variety of educational concepts, theories and practices existent in the early republic and antebellum periods. As Bernard Bailyn observed in his work on the subject, a history of American education is a history of American culture, since education is, in its broadest

44. See, e.g., CARL KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860*, at 77 (describing ideology of school reformers); *id.* at 80 (describing anxieties); *id.* at 163 (noting the view that the Irish Catholics should be Americanized in the schools). See also *infra* Part III.B.

45. See *infra* Parts II.C. & III. The examples are numerous. Students read from the Protestant Bible and sang Protestant hymns, among other things.

46. See, e.g., KAESTLE, *supra* note 44, at 117; see Part III, *infra*.

47. KAESTLE, *supra* note 44, at 166–67 (1983).

48. See *supra* note 380 and accompanying text; see Part IV (describing conflicts involving Catholics).

49. See, e.g., Sch. Bd. Dist. No. 18 v. Garvin Cty, 103 P. 578 (Okla. 1909) (recognizing the authority of the parent over the education of the child “except where modified by statute”).

50. TYACK, JAMES & BENAVIDES, *supra* note 41, at 163 (discussing challenges to Bible reading in the curriculum).

51. See *Yoder*, 406 U.S. at 214.

sense, the mechanism by which one generation transmits its culture to the next.⁵² Such a work is obviously beyond the scope of a short paper. This article by no means purports to offer a complete account of education history, or even, for that matter, a modestly detailed one. Instead, it aims to adduce details and highlight trends documented by leading education historians. Using the scholarship of Lawrence Cremin, Carl Kaestle, and David Tyack as a foundation, this article draws original legal conclusions about parental interests and religious liberties.⁵³ Although the works of Cremin, Kaestle and Tyack are well-known in the fields of education and history,⁵⁴ they have received relatively scant attention in the field of law.⁵⁵ While there is a substantial body of historical literature on federal jurisprudence of religious education after the first World War,⁵⁶ not enough has been said in legal scholarship about education in earlier periods, during which the American tradition of joint parent-state control over education took shape.

B. Education and the Meaning of the Religion Clauses

An awareness of the history of education is also essential

52. BERNARD BAILYN, *EDUCATION IN THE FORMING OF AMERICAN SOCIETY* 14 (1960).

53. See, e.g., TYACK, JAMES & BENAVIDES, *supra* note 41; KAESTLE, *supra* note 44; LAWRENCE CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783–1876* (1980) [hereinafter *THE NATIONAL EXPERIENCE*]; LAWRENCE CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE, 1607–1783* (1970) [hereinafter *THE COLONIAL EXPERIENCE*].

54. For an example of its use in larger, synthetic histories, see DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 449–55 (2007).

55. See, e.g., MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* 214–21 (2008); NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 57–110 (2005) [hereinafter *DIVIDED BY GOD*]; Michael Newson, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L.J. 219 (2002); John E. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

56. See, e.g., WILLIAMS ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917–1927* (1996); Eric DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 B.Y.U. EDUC. & L.J. 363 (2003); Edward Gaffney, Jr., *Pierce and Parental Liberty as a Core Value in Educational Policy*, 78 U. DET. MERCY L. REV. 491 (2001); Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 CAP. U. L. REV. 887 (1996). For a contemporary treatment of these issues, see JAMES DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* (1998); ROBERT KUNZMAN, *GRAPPLING WITH THE GOOD* (2006); Rob Reich, *Opting Out of Education: Yoder, Mozart, and the Autonomy of Children*, 52 EDUC. THEORY 445 (2003).

for First Amendment scholarship. Scholars of the Religion Clauses often overlook the significance of educational practices. For example, while it is true that, as a leading scholar observed, “by 1834, no state in the Union would have an established church,”⁵⁷ states continued to support and to regulate religious education long past 1834, until the end of the nineteenth century. As is now well documented in historical scholarship, the common school system, which was created during this period, was, in effect, state-sponsored Protestant education, replete with singing hymns, reciting prayers, and reading the King James Bible—as well as discrimination and violence directed towards non-Protestants. For this reason, it is hard to regard “universal disestablishment” as evidence that by 1834 “the tradition of separation between church and state would seem an ingrained and vital part of our constitutional system.”⁵⁸ How could that be, when the school system—then the country’s largest and most successful bureaucracy, short of the military—was devoted to inculcating sectarian religious beliefs?⁵⁹ Even after universal disestablishment, states offered denominational instruction in public schools and funded many parochial schools.⁶⁰

Even where legal scholars take note of the history of education, they often paint only a partial picture. Again, First Amendment scholarship provides an illustration. Our educational practices pose a challenge for scholars of the First Amendment because they do not fit neatly into the leading accounts of religious liberty. Accounts of the Religion Clauses can be divided into *equality theories* and *liberty theories*.⁶¹

57. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437 (1990).

58. *Id.*

59. See *infra* Part III.

60. See KAESTLE, *supra* note 44, at 167 (describing the use of public funds to support Catholic schools and observing, “[t]he idea of separation of church and state with regard to education did not spring full-blown from the United States Constitution. It was a public policy developed gradually and unevenly at the local level during the nineteenth century.”).

61. This distinction is not intended to be exhaustive. Nor is it the only possible distinction between different accounts of our religious liberties. For example, another common distinction is between *voluntarism*, or *separatism*, and *nonpreferentialism*. KATHLEEN SULLIVAN, FIRST AMENDMENT LAW 495, 507 (2003). The voluntarism-nonpreferentialism distinction shares elements in common with liberty theory-equality theory distinction. But there are differences between the distinctions as well. Most notably, the voluntarism-nonpreferentialism distinction is, at its core, a doctrinal distinction, while the liberty theory-equality theory distinction is best described as a

According to equality theories, the purpose of the Religion Clauses is to preserve *political equality* by protecting members of minority religions from members of majority religions. To take the most prominent example, Justice O'Connor defends an equality theory of the Establishment Clause, under which the clause constrains the public display of religious symbols. She first introduced the equality theory in her concurrence in *Lynch v. Donnelly*.⁶² *Lynch* concerned an Establishment Clause challenge to a Christmas display in a city park.⁶³ Writing for the Court, Justice Burger applied *Lemon v. Kurtzman* and upheld the display. In her concurrence, Justice O'Connor attempted to refocus *Lemon*. She suggested that, at its core, the Establishment Clause prohibited the government from making religion relevant to political standing.⁶⁴ The government would offend this principle if it indicated that Christians were members of a favored, inside group, and non-Christians disfavored outsiders.⁶⁵ O'Connor argued that the city display in *Lynch* did not communicate such a message. The variety of symbols in the display suggested the celebration of a shared, public holiday, not religious favoritism.⁶⁶ In broader terms, the public display left undisturbed the political equality of Christians and non-Christians. Justice O'Connor's equality theory thus articulates a limit on public displays of religious symbols.⁶⁷

Martha Nussbaum defends a broader version of the equality theory, arguing that both the Establishment Clause and the Free Exercise Clause are best understood in terms of political equality.⁶⁸ Moreover, unlike Justice O'Connor in *Lynch*,⁶⁹ Nussbaum defends her equality theory on historical grounds. According to Nussbaum, history shows that the "dominant American political tradition" rejects "in-group"

distinction between competing political values.

62. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 694 (2002) [hereinafter *Liberty to Equality*].

63. *Lynch*, 465 U.S. at 671-72.

64. *Id.* at 672 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

65. *Id.* at 687-88.

66. *Id.* at 688.

67. The court endorsed O'Connor's equality theory of the Establishment Clause in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

68. NUSSBAUM, *supra* note 55, at 16.

69. *Liberty to Equality*, *supra* note 62, at 694.

Many reformers argued that the state should use schools to “Americanize” newly-arrived immigrants—a practice clearly intended to interfere with the efforts of parents to pass on ethnic, cultural and religious traditions.⁴⁴ To that end, school curricula included explicit religious content.⁴⁵ These schools were funded at least in part by public monies.⁴⁶

History also shows that the concepts we use today to analyze legal, education-related conflicts between parents and the state are relatively new. Many early educational practices do not fit neatly into contemporary legal categories. For example, the distinction between public and private education, so central today, simply did not exist until the 1830s.⁴⁷ Nor were conflicts between parents and the state typically conceived of as *legal*—they were *political* conflicts and resolved at the ballot box or in state legislatures.⁴⁸ Where legal conflicts did emerge, “parental rights” lacked constitutional significance. Although courts at common law recognized a parental right to control the education of children, those rights could be abrogated by acts of the legislature,⁴⁹ and the assertion that parental rights were a trump against state regulation did not emerge until the end of the nineteenth century.⁵⁰ This suggests that it is inaccurate to characterize parental rights as “traditional” in contrast to the powers of the state.⁵¹

This article attempts to illustrate the variety of educational concepts, theories and practices existent in the early republic and antebellum periods. As Bernard Bailyn observed in his work on the subject, a history of American education is a history of American culture, since education is, in its broadest

44. See, e.g., CARL KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860*, at 77 (describing ideology of school reformers); *id.* at 80 (describing anxieties); *id.* at 163 (noting the view that the Irish Catholics should be Americanized in the schools). See also *infra* Part III.B.

45. See *infra* Parts II.C. & III. The examples are numerous. Students read from the Protestant Bible and sang Protestant hymns, among other things.

46. See, e.g., KAESTLE, *supra* note 44, at 117; see Part III, *infra*.

47. KAESTLE, *supra* note 44, at 166–67 (1983).

48. See *supra* note 380 and accompanying text; see Part IV (describing conflicts involving Catholics).

49. See, e.g., *Sch. Bd. Dist. No. 18 v. Garvin Cty*, 103 P. 578 (Okla. 1909) (recognizing the authority of the parent over the education of the child “except where modified by statute”).

50. TYACK, JAMES & BENAVIDES, *supra* note 41, at 163 (discussing challenges to Bible reading in the curriculum).

51. See *Yoder*, 406 U.S. at 214.

sense, the mechanism by which one generation transmits its culture to the next.⁵² Such a work is obviously beyond the scope of a short paper. This article by no means purports to offer a complete account of education history, or even, for that matter, a modestly detailed one. Instead, it aims to adduce details and highlight trends documented by leading education historians. Using the scholarship of Lawrence Cremin, Carl Kaestle, and David Tyack as a foundation, this article draws original legal conclusions about parental interests and religious liberties.⁵³ Although the works of Cremin, Kaestle and Tyack are well-known in the fields of education and history,⁵⁴ they have received relatively scant attention in the field of law.⁵⁵ While there is a substantial body of historical literature on federal jurisprudence of religious education after the first World War,⁵⁶ not enough has been said in legal scholarship about education in earlier periods, during which the American tradition of joint parent-state control over education took shape.

B. Education and the Meaning of the Religion Clauses

An awareness of the history of education is also essential

52. BERNARD BAILYN, *EDUCATION IN THE FORMING OF AMERICAN SOCIETY* 14 (1960).

53. See, e.g., TYACK, JAMES & BENAVIDES, *supra* note 41; KAESTLE, *supra* note 44; LAWRENCE CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783–1876* (1980) [hereinafter *THE NATIONAL EXPERIENCE*]; LAWRENCE CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE, 1607–1783* (1970) [hereinafter *THE COLONIAL EXPERIENCE*].

54. For an example of its use in larger, synthetic histories, see DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 449–55 (2007).

55. See, e.g., MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* 214–21 (2008); NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 57–110 (2005) [hereinafter *DIVIDED BY GOD*]; Michael Newson, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L.J. 219 (2002); John E. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

56. See, e.g., WILLIAMS ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917–1927* (1996); Eric DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 B.Y.U. EDUC. & L.J. 363 (2003); Edward Gaffney, Jr., *Pierce and Parental Liberty as a Core Value in Educational Policy*, 78 U. DET. MERCY L. REV. 491 (2001); Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 CAP. U. L. REV. 887 (1996). For a contemporary treatment of these issues, see JAMES DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* (1998); ROBERT KUNZMAN, *GRAPPLING WITH THE GOOD* (2006); Rob Reich, *Opting Out of Education: Yoder, Mozert, and the Autonomy of Children*, 52 EDUC. THEORY 445 (2003).

for First Amendment scholarship. Scholars of the Religion Clauses often overlook the significance of educational practices. For example, while it is true that, as a leading scholar observed, “by 1834, no state in the Union would have an established church,”⁵⁷ states continued to support and to regulate religious education long past 1834, until the end of the nineteenth century. As is now well documented in historical scholarship, the common school system, which was created during this period, was, in effect, state-sponsored Protestant education, replete with singing hymns, reciting prayers, and reading the King James Bible—as well as discrimination and violence directed towards non-Protestants. For this reason, it is hard to regard “universal disestablishment” as evidence that by 1834 “the tradition of separation between church and state would seem an ingrained and vital part of our constitutional system.”⁵⁸ How could that be, when the school system—then the country’s largest and most successful bureaucracy, short of the military—was devoted to inculcating sectarian religious beliefs?⁵⁹ Even after universal disestablishment, states offered denominational instruction in public schools and funded many parochial schools.⁶⁰

Even where legal scholars take note of the history of education, they often paint only a partial picture. Again, First Amendment scholarship provides an illustration. Our educational practices pose a challenge for scholars of the First Amendment because they do not fit neatly into the leading accounts of religious liberty. Accounts of the Religion Clauses can be divided into *equality theories* and *liberty theories*.⁶¹

57. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437 (1990).

58. *Id.*

59. See *infra* Part III.

60. See KAESTLE, *supra* note 44, at 167 (describing the use of public funds to support Catholic schools and observing, “[t]he idea of separation of church and state with regard to education did not spring full-blown from the United States Constitution. It was a public policy developed gradually and unevenly at the local level during the nineteenth century.”).

61. This distinction is not intended to be exhaustive. Nor is it the only possible distinction between different accounts of our religious liberties. For example, another common distinction is between *voluntarism*, or *separatism*, and *nonpreferentialism*. KATHLEEN SULLIVAN, FIRST AMENDMENT LAW 495, 507 (2003). The voluntarism-nonpreferentialism distinction shares elements in common with liberty theory-equality theory distinction. But there are differences between the distinctions as well. Most notably, the voluntarism-nonpreferentialism distinction is, at its core, a doctrinal distinction, while the liberty theory-equality theory distinction is best described as a

According to equality theories, the purpose of the Religion Clauses is to preserve *political equality* by protecting members of minority religions from members of majority religions. To take the most prominent example, Justice O'Connor defends an equality theory of the Establishment Clause, under which the clause constrains the public display of religious symbols. She first introduced the equality theory in her concurrence in *Lynch v. Donnelly*.⁶² *Lynch* concerned an Establishment Clause challenge to a Christmas display in a city park.⁶³ Writing for the Court, Justice Burger applied *Lemon v. Kurtzman* and upheld the display. In her concurrence, Justice O'Connor attempted to refocus *Lemon*. She suggested that, at its core, the Establishment Clause prohibited the government from making religion relevant to political standing.⁶⁴ The government would offend this principle if it indicated that Christians were members of a favored, inside group, and non-Christians disfavored outsiders.⁶⁵ O'Connor argued that the city display in *Lynch* did not communicate such a message. The variety of symbols in the display suggested the celebration of a shared, public holiday, not religious favoritism.⁶⁶ In broader terms, the public display left undisturbed the political equality of Christians and non-Christians. Justice O'Connor's equality theory thus articulates a limit on public displays of religious symbols.⁶⁷

Martha Nussbaum defends a broader version of the equality theory, arguing that both the Establishment Clause and the Free Exercise Clause are best understood in terms of political equality.⁶⁸ Moreover, unlike Justice O'Connor in *Lynch*,⁶⁹ Nussbaum defends her equality theory on historical grounds. According to Nussbaum, history shows that the "dominant American political tradition" rejects "in-group"

distinction between competing political values.

62. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 694 (2002) [hereinafter *Liberty to Equality*].

63. *Lynch*, 465 U.S. at 671–72.

64. *Id.* at 672 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

65. *Id.* at 687–88.

66. *Id.* at 688.

67. The court endorsed O'Connor's equality theory of the Establishment Clause in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

68. NUSSBAUM, *supra* note 55, at 16.

69. *Liberty to Equality*, *supra* note 62, at 694.

favoritism and embraces religious equality.⁷⁰ In particular, the American tradition connects political equality with a special regard for the conscience. The individual conscience is unique, valuable and vulnerable; it is the means by which individuals search for what is ultimately valuable in life.⁷¹ A society that purports to treat people as equals thus ought to accord the conscience of each individual equal respect and afford it some protection against governmental encroachment. While equal respect in matters of conscience does not mean conceding the truth of others' religious beliefs,⁷² it does require placing restrictions on the public display of symbols (as O'Connor's equality theory did), as well as accommodation from some laws that impinge on religious beliefs and conduct.

Liberty theorists take a different view of the meaning of the Religion Clauses. Under the liberty theory, the purpose of the Establishment and Free Exercise Clauses is to protect *liberty of conscience*, not political equality.⁷³ For example, Noah Feldman rejects the view of equality theorists that the Establishment Clause was designed to protect religious minorities from persecution by majorities, a paradigmatic violation of political equality.⁷⁴ Instead, according to Feldman, both the Establishment and Free Exercise Clauses aim to protect individuals from coercion.⁷⁵ Coercion is problematic because of the special role the conscience plays in the formation of religious beliefs. The conscience, according to this view, informs us of our religious duties. Neither the church nor the state has the power to change what conscience dictates. Since individuals cannot consent to compulsion in matters of conscience, a government whose power derives from the consent of the governed has no authority to coerce in matters of conscience.⁷⁶

According to Feldman, the founders drew on the liberty of conscience in their resistance to the use of tax receipts to fund establishment churches. Imposing a tax to support a religious

70. NUSSBAUM, *supra* note 55, at 2–5.

71. *Id.* at 52–53.

72. *Id.* at 23.

73. Nussbaum's equality theory also made use of the notion of conscience. But unlike Nussbaum's equality theory, in which preserving *political equality* is the reason we protect individual choices in matters of conscience, liberty theories explain religious protections in terms of the value of conscience itself.

74. *Liberty to Equality*, *supra* note 62, at 682–83.

75. *DIVIDED BY GOD*, *supra* note 55, at 48.

76. *Id.* at 27–28.

institution or official whom one does not support, they argued, violates liberty of conscience.⁷⁷ The scope of both the Establishment Clause and the Free Exercise Clause reflects just this concern; where coercion against conscience is not at issue—for example, in the public display of religious symbols—constitutional protections are not implicated.⁷⁸

However, the history of education supports neither a pure equality theory nor a pure liberty theory. For example, consider the common school system, the forerunner of today's public school system. In the cities, the common schools evolved from charity schools run by urban churches and religious voluntary associations.⁷⁹ These organizations provided free schooling to the children of the poor on the theory that it was necessary to *intervene* between the parent and the child to save the child from a life of poverty.⁸⁰ Intervention was accomplished by schooling. The curriculum was strongly moral and religious, and included instruction in the sponsoring denomination's most basic commitments and practices. The common schools that emerged from the charity schools largely adopted the same philosophy. They aimed to impose on children a common religious and moral character, while preparing them to live in a democracy and "Americanizing" the newly arrived immigrants, many of whom were Catholics.⁸¹ At a theoretical level, then, the common school system and its predecessors were thoroughly *republican*: their express aim was to instill "virtue" in the attending children, not to respect individual rights.⁸²

77. *Id.* at 32.

78. Strangely enough, Madison believed that assessments in support of established churches, which allowed the taxpayer to elect a recipient, also violated the liberty of conscience. Irving Brant, *Madison: On the Separation of Church and State*, 8 WM. & MARY Q. 4, 12 (1951). Feldman argues in *DIVIDED BY GOD* that, for the same reason, nonpreferentialism—the public support of religious activities in a way that expresses no preference between them—violates the liberty of conscience. Thus Feldman's version of the liberty theory would in fact rule out nonpreferential programs of public support for religion. Despite its pedigree, this argument is subtle at best. It is not apparent that a liberty theory of the Establishment Clause would be required to reject nonpreferential public support of religion. Of course, an equality theory of the Establishment Clause would likely reject nonpreferential public support of religion. The equality theory is sensitive to the political status of nonbelievers as well as believers; even if public support was nonpreferential among religious groups, by definition it expresses a preference between religion and non-religion.

79. See *infra* Part II.C.

80. See KAESTLE, *supra* note 44, at 32–33; see *infra* Parts II.C. & III.B.

81. See *infra* Part III.B.

82. "The republican style of American education was compounded of four fundamental beliefs: that education was crucial to the vitality of the Republic; that a

Protestantism supplied those virtues. Indeed, *schooling could not have accomplished its purpose had it been impermissible to impose favored religious beliefs.*

The practice of imposing favored religious beliefs threatens both liberty of conscience and political equality. As a result, liberty theorists and equality theorists may tend towards a version of America's educational history that emphasizes respect for liberty of conscience and political equality and downplays inconsistent practices. But to understand the meaning and scope of our religious liberties, we must acknowledge the history of our efforts to influence matters of conscience and to tie religion to political standing. Liberty theories and equality theories may be able to acknowledge these practices, but doing so will surely require a modification of their central claims.

* * *

proper republican education consisted of the diffusion of knowledge, the nurturance of virtue (including patriotic civility), and the cultivation of learning; that schools and colleges were the best agencies . . . ; and that the most effective means of obtaining the requisite number and kind of schools was through some system tied to the polity." THE NATIONAL EXPERIENCE, *supra* note 53, at 148. See also note 105 and accompanying text.

This article proceeds in four parts. In Part II, the article discusses the importance that the founders ascribed to formal education, focusing on the significance of public virtue and homogeneity. This part also contrasts ambitious plans for state systems of free schools proposed by Thomas Jefferson and Benjamin Rush with the actual schooling practices of the period, which were variegated and subject almost exclusively to local control. In Part III, the article discusses the rise of the common school system in the early nineteenth century, focusing on the social changes that gave new force to old arguments for systematic, free schooling, as well as the religious content of the common school curriculum. This discussion highlights important changes introduced by common school reformers to the educational theories of the founders. Part IV of the article discusses the most important source of resistance to common school reform—the Catholic school movement. Catholics transformed educational practices by creating their own schools, contesting the use of public funds, and challenging the overtly Protestant content of the common school curriculum. Each of these disputes was important in shaping public education and religious education. Part V of the article returns to the themes of the Introduction and assesses the significance of the history of education for courts and for First Amendment scholarship.

II. EARLY AMERICAN EDUCATIONAL THEORY AND PRACTICE

A. The Context of American Education

The earliest plans for formal schooling in America arose in an educational context very different than today. In seventeenth century England, education took place almost exclusively in the home, the community, and the church.⁸³ These institutions provided *informal* instruction, consisting mostly of basic socialization, moral instruction, and vocational training. Personal enrichment and scholarship were, in contrast, of very little concern.⁸⁴ *Formal* education was carried out in institutions outside the home and church, predominantly in English grammar schools and universities. Surprisingly,

83. See BAILYN, *supra* note 52, at 15–18.

84. *Id.*

personal enrichment and scholarship were not the focus of formal education either. Instead, like informal education, formal education was predominantly utilitarian; for example, reading and writing led to literacy, which had economic and social value for nearly everyone.⁸⁵ Utility also formed the basis of the limited state interest in education—an interest that was expressed primarily in terms of control, rather than subsidy. As Bernard Bailyn put it, the state was “exhortatory, empowering, supervisory, [and] regulatory,” but “neither initiating nor sustaining.”⁸⁶ Instead of enjoying public financial support, most schools relied on private gifts.⁸⁷

In America, English educational practices quickly changed, due to the challenges of settling a new land. America was a wilderness, and in the wilderness many of the social structures that supported informal education in England simply did not exist, or failed.⁸⁸ For example, the demands of settlement undermined parental authority, since children were hardier and more adaptable, and thus possessed a natural advantage over their older parents. The need for parents to engage in menial labor and the starvation the colonists often faced also damaged parental stature.⁸⁹ Colonists understood the failure of the parental authority and other social structures as a moral indictment of their life in the new world. The Puritans of Massachusetts Bay took this indictment particularly seriously and, in response, transformed implicit, informal and moderate norms into explicit, formal and severe regulations, many of which regulated the most intimate matters of family life.⁹⁰ Around 1663, Jonathan Mitchell explained: “We in this country, being far removed from the more cultivated parts of the world, had need to use utmost care and diligence to keep up learning and all helps to education among us, lest degeneracy, barbarism, ignorance and irreligion do by degrees break in upon us.”⁹¹

85. See THE COLONIAL EXPERIENCE, *supra* note 53, at 176 (describing how the increased availability of schooling in seventeenth century England led to an increase in the literacy rate).

86. BAILYN, *supra* note 52, at 20.

87. *Id.*

88. THE COLONIAL EXPERIENCE, *supra* note 53, at 135, 176–77; BAILYN, *supra* note 52, at 22.

89. BAILYN, *supra* note 52, at 22.

90. *Id.* at 23.

91. THE COLONIAL EXPERIENCE, *supra* note 53, at 177 (quoting Jonathan

The threat of "barbarism" in colonial America led to two major changes in traditional educational practices. First, formal education became more important than it previously had been. Schools began to provide the moral instruction that had previously been carried out wholly in the home and church. Massachusetts Bay illustrates this development.⁹² There, colonists began to establish free primary schools for the moral instruction of children in 1635, within about five years of their arrival.⁹³ Twelve years later, in 1647, the Massachusetts General Court passed the School Act, requiring towns with a population over 50 to establish primary schools, and towns with a population over 100 to establish grammar schools.⁹⁴ These schools were financed by a variety of means, including rents, taxes, subscription fees, donations of land, grants, and private tuition.⁹⁵ Connecticut and Plymouth passed similar laws shortly thereafter.⁹⁶

Second, the state (in this case, the colonial government) began to regulate educational practices *inside* the home.⁹⁷ Massachusetts Bay again provides an example. Among its many other regulations of family life, the colony required families to provide children the kinds of vocational and moral instruction they had previously provided in England.⁹⁸ To be sure, while there existed penalties for breaking these laws, little evidence exists that the laws were enforced.⁹⁹ Nevertheless, the laws mark an early expression of state interest in moral and religious education, and in the state's

Mitchell, *A Modell for the Maintaining of Students and Fellows of Chose Abilities at the Colledge in Cambridge*, PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS XXXI, 311 (1935)).

92. Of course, one cannot usually generalize from Massachusetts Bay to the other colonies. There were important differences between the educational practices of Virginia, Massachusetts, and New York. However, since the practices of this period are not the focus of this paper, I omit these differences. See THE COLONIAL EXPERIENCE, *supra* note 53, at 9-20, 176-91.

93. THE COLONIAL EXPERIENCE, *supra* note 53, at 180.

94. *Id.* at 181-82.

95. See *id.* at 181, 184, 193.

96. *Id.* at 182.

97. *Id.* at 176; see BAILYN, *supra* note 52, at 23.

98. BAILYN, *supra* note 52, at 23-24; see THE COLONIAL EXPERIENCE, *supra* note 53, at 124-25.

99. See THE COLONIAL EXPERIENCE, *supra* note 53, at 126 ("These laws relating to household education are best viewed as essentially normative but only partially descriptive, and we shall never know precisely the extent to which they were actually honored or obeyed.").

willingness to supplant the family when it perceived a threat of breakdown.¹⁰⁰

Two breakdowns in particular threatened the colonists. First, in Massachusetts Bay, colonists were acutely sensitive to the risk of *moral* breakdown.¹⁰¹ Second, in both Massachusetts and Virginia, colonists were sensitive to the risk of *social* and *political* breakdown, starvation, and the failure of the settlement.¹⁰² By posing these dangers of breakdown, the wilderness of America transformed education into a “matter of public concern,” implicating the interests of the state in a new way.¹⁰³ This in turn led to greater state involvement and less familial control over the education of youth. This same impetus and change exist in both the founding and antebellum periods. In both periods, concerns over political and social instability give risk to assertions of state control over education. Of course, for obvious reasons, the founders were deeply concerned with political and social instability. They articulate these dangers, however, in a language different from the language of the colonists of Massachusetts Bay—the language of republicanism.

B. Educational Theory and Reform in the Founding Period

1. Formal education and virtue

The founders believed that formal education was of central importance to republican government. At a general level, there appears to have been broad agreement that this was because

100. See BAILYN, *supra* note 52, at 26–27; THE COLONIAL EXPERIENCE, *supra* note 53, at 126.

101. See THE COLONIAL EXPERIENCE, *supra* note 53, at 163, 176–77 (describing the threat of “satanic barbarism” posed by the wilderness); *id.* at 181 (quoting the School Act, which argued that education was necessary to enable individuals to read the Bible); see also *id.* at 15–16 (observing that the Puritans “were seeking to demonstrate to the world at large the nature and practicability of a divinely order Christian commonwealth. . . . [W]ithin such a society education would assume utmost importance . . . as an agency for deliberately pursuing a cultural ideal.”).

102. See *id.* at 13–14 (discussing early English attempts at colonization in Virginia and noting, “by 1622, it had become apparent that the English experience in the New World would be fundamentally different than the Spanish, that its success would be tied to the development of self-sufficient agricultural and trading communities, that self-sufficiency would sooner or later require the planting of families, and that the planting of families would be facilitated by [educational] institutions likes those of England.”).

103. THE COLONIAL EXPERIENCE, *supra* note 53, at 193.

formal education functioned to impart *virtue* to students.¹⁰⁴ Yet there were different views of why virtue was significant in a republic. For example, according to the view of republicanism dominant in America before the Revolution, virtue was necessary for the survival of republics because it ensured the *obedience* of citizens to legal authority.¹⁰⁵ In a monarchy, the “magnificence” and power of the monarch so impressed his subjects that they obeyed law out of fear. But in a republic, the rulers were servants of the citizens they ruled. Legislators possessed neither the magnificence of the monarch nor his power, since they governed only by the consent of the people and could be removed by them.¹⁰⁶ For the republic to survive, the people simply had to be willing to obey the laws. This required a sense of public virtue, of sacrificing one’s private interests to the common good. If a republic’s citizens were not virtuous, it would descend into licentiousness or anarchy.¹⁰⁷

Some of the founders clearly believed that formal education was necessary to ensure that a republic’s laws were *obeyed*. In a relatively late statement of this view, Benjamin Rush argued that public education ought to teach a pupil that:

he does not belong to himself, but that he is public property. Let him be taught to love his family, but let him be taught, at the same time, that he must forsake and even forget them, when the welfare of his country requires it. . . . He must love private life, but he must decline no station, however public or responsible it may be, when called to it by the suffrages of his fellow citizens. . . . He must love character, and have a due sense of injuries, but he must be taught to appeal only to the laws of the state, to defend the one, and punish the other.¹⁰⁸

According to the pre-revolutionary Whig, representative

104. KAESTLE, *supra* note 44, at 8.

105. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 66 (2d. ed. 1998).

106. *Id.*

107. *See id.* at 67–68.

108. BENJAMIN RUSH, *A PLAN FOR THE ESTABLISHMENT OF PUBLIC SCHOOLS AND THE DIFFUSION OF KNOWLEDGE IN PENNSYLVANIA* 20-21 (1786), *quoted in* David Tyack, *Forming the National Character: Paradox in the Educational Thought of the Revolutionary Generation*, 36 HARV. ED. REV. 29, 34 (1966); *see also* KAESTLE, *supra* note 44, at 4–5 (“How, then, were [Americans] to escape the degeneration into anarchy that they believed was the inevitable fate of pure democracies? . . . Political theorists were therefore concerned not only with protecting liberty . . . , but also with maintaining order Education could play an important role in reconciling freedom and order.”).

bodies would naturally pass laws that promoted the common good.¹⁰⁹ A virtuous individual would recognize the good in the legislature's laws and would be inclined, because of his public virtue, to set aside his narrow private interests in favor of the common interest.¹¹⁰ Public virtue would thus imbue citizens with an internal inclination to follow the law.¹¹¹

Later statements often reflect a different understanding of the significance of formal education for a republic. As Bernard Bailyn and Gordon Wood have shown, the republicanism of American Whigs was under heavy pressure during the 1770s and 1780s, and many aspects of their ideology drifted.¹¹² Changes in republicanism may have affected the public discourse about formal education. A broad set of views emerged about the relationship between formal education and government.

First, some founders argued that formal education was essential for preparing republican *leaders*.¹¹³ According to Jefferson, writing in 1818, one of the objects of higher education was to "form the statesmen, legislators and judges, on whom public prosperity and individual happiness are so much to depend."¹¹⁴ Education would do this by making leaders well informed. "[W]here government is in the hands of the people," observed Noah Webster, "knowledge should be universally diffused by means of public schools. Of such consequence is it to society that the people who make laws should be well informed that I conceive no legislature can be justified in neglecting proper establishments for this purpose."¹¹⁵ Being well informed, to be sure, was in part a scholarly accomplishment, but it was a normative one as well.

109. WOOD, *supra* note 105, at 56.

110. WOOD, *supra* note 105, at 68.

111. Encouraging respect for the law was hardly the only republican line of thought about education with which the founders would have been familiar. Locke's theory that education was necessary for an informed consent to government, and that most people were improvable by education, was of course well known. See THE COLONIAL EXPERIENCE, *supra* note 53, at 419–421, 439. Robert Molesworth's work, *An Account of Denmark, As It Was in the Year 1692*, emphasized the importance of an education in public virtue to preserving liberty and preventing tyranny. *Id.* at 425. Founders' views of education reflected both theses.

112. See BAILYN, *supra* note 52, at 45–49; WOOD, *supra* note 105, at 46–90.

113. KAESTLE, *supra* note 44, at 6.

114. REPORT OF THE COMMISSIONERS FOR THE UNIVERSITY OF VIRGINIA (Aug. 1–4, 1818), *quoted in* THE NATIONAL EXPERIENCE, *supra* note 53, at 111 (1980).

115. TYACK, JAMES & BENAVIDES, *supra* note 41, at 24.

Schools were to serve as “nurseries of wise and good men,” educating future leaders so that they could later perceive the common good.¹¹⁶ An education in virtue was thus necessary to prepare leaders.¹¹⁷

Second, many regarded education as crucial to the substantive reform of the *people* themselves.¹¹⁸ According to this line of thought, the people had to be improved for republican government to survive.¹¹⁹ This was necessary to protect the government from the vicissitudes of the people.¹²⁰ Washington emphasized this point in his Farewell Address. Arguing that future governments should provide “institutions for the general diffusion of knowledge,” Washington observed, “In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.”¹²¹ Jefferson also expressed concern that public opinion be educated, in order to “give a wholesome direction” to the force which served as the ultimate guardian of public welfare.¹²² Demographic changes in America served to heighten this concern. While in Jefferson’s mind the yeoman farmer was naturally virtuous, immigration was already signaling his relative decline, and those now entering the country could not be assumed to be naturally virtuous.¹²³ Virtue and knowledge were especially important if citizens were to instruct their representatives, as was sometimes the practice,¹²⁴ but they were also important for even the indirect exercise of popular

116. *Id.* at 23; KAESTLE, *supra* note 44, at 6.

117. This proposition stands somewhat in tension with traditional republican theory. On that theory, the common good was public welfare, and was determined by common consent. If the people were allowed to rule themselves, as was the case in a republic, they would almost always promote the common good. To imagine that the legislature might act against the common good was nearly a contradiction. See WOOD, *supra* note 105, at 56. Why such a body would need a virtuous leader is unclear.

118. DIVIDED BY GOD, *supra* note 55, at 58–59.

119. *Id.*; TYACK, JAMES & BENAVIDOT, *supra* note 41, at 14 (“One way to save republican government from the uninstructed minds and unruly wills of the people was to educate the citizens correctly—that is, to instill proper civic beliefs and mold upright individual character.”).

120. TYACK, JAMES & BENAVIDOT, *supra* note 41, at 15.

121. *Washington’s Farewell Address* (1796), available at http://avalon.law.yale.edu/18th_century/washing.asp.

122. ROBERT M. HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION 180 (1962); *cf.* THE FEDERALIST NO. 49 (James Madison) (“[I]t is the reason, alone, of the public that ought to controul and regulate the government. The passions ought to be controuled and regulated by the government.”).

123. KAESTLE, *supra* note 44, at 5.

124. See TYACK, JAMES & BENAVIDOT, *supra* note 41, at 24.

control, since education was necessary for citizens to vote intelligently.¹²⁵ As Benjamin Rush saw it in 1785, what republicanism required was that individuals set aside their local interests for the common good; education could make this possible by turning men into “republican machines.”¹²⁶

Third, a formal education was also necessary to protect “the people” from the excesses of government. This line of reasoning had long been applied outside the context of republican government: education served to protect the people against a demagogue attempting to upset the historical, customary “constitution,” and, conversely, ignorance served a demagogue’s ends.¹²⁷ But the dysfunction of state legislatures in the 1780s suggested to the founders that an education in virtue was necessary even to limit the excesses of a republican legislature.¹²⁸ Contrary to the traditional republican theory, under which the only danger attendant to republican government was licentiousness or anarchy, a government of the people in fact also posed a danger of tyranny.¹²⁹ Education was necessary for the people to resist. Thus, in the preamble to his *Bill for the More General Diffusion of Knowledge*, first proposed in the Virginia Assembly in 1778, Jefferson suggested that even the people of a republic would require education so that they could recognize and resist “ambition under all its shapes.”¹³⁰ As Jefferson then understood it, even republican government could tyrannize the people.¹³¹

2. The school system and homogeneity

More important than any of these particular theories, however, was the goal of transforming the haphazard and highly localized schools prevalent at the founding into a school

125. KAESTLE, *supra* note 44, at 5.

126. WOOD, *supra* note 105, at 426; TYACK, JAMES & BENAVIDES, *supra* note 41, at 34.

127. See TYACK, JAMES & BENAVIDES, *supra* note 41, at 25 (quoting Justice Joseph Story in *On the Science of Government as a Branch of Popular Education*, in THE INTRODUCTORY DISCOURSE AND THE LECTURES DELIVERED BEFORE THE AMERICAN INSTITUTE IN BOSTON, AUGUST 1834 248–75 (Boston, 1835)).

128. Cf. WOOD, *supra* note 105, at 426 (discussing the need to educate the people to cure vice, but not differentiating between excesses of government and vicissitudes of popular opinion).

129. *Id.* at 62.

130. Thomas Jefferson, *A Bill for the More General Diffusion of Knowledge*, ¶ 1 (1778), available at <http://oll.libertyfund.org/title/755/86186>.

131. See THE COLONIAL EXPERIENCE, *supra* note 53, at 439.

system. As the founders saw it, some form of common, institutionalized education was necessary to homogenize the citizens of America's broadly diverse and distant regions.¹³² Montesquieu's well known theory required republics to be small and homogenous, to ensure that the interests of the citizens would be roughly similar.¹³³ America, in contrast, was neither small nor homogenous.¹³⁴ Already by 1785, Jefferson expressed the worry that immigration was turning the Confederation into a "heterogeneous, incoherent, distracted mass."¹³⁵ Moreover, the colonies differed from each other in striking ways, from climate and culture to economy. The founders understood that these differences could produce divergent political interests.¹³⁶ As Shay's rebellion in Massachusetts evidenced, even within one state, such differences could boil over into overt hostility.¹³⁷

Creating a shared national identity strong enough to support loyalty to the republic was thus a central concern. Washington, for example, suggested that "[t]he more homogenous our citizens can be made in [principles, opinions, and manners], the greater will be our prospect of permanent union."¹³⁸ Textbook authors sought to contribute to homogeneity by standardizing American English spelling and pronunciation, as Webster famously did in *The American Spelling Book*.¹³⁹ However, the centerpiece of the effort,

132. See KAESTLE, *supra* note 44, at 4–5.

133. See MONTESQUIEU, *SPIRIT OF THE LAWS, Of the Corruption of the Principles of the Three Governments* bk. 8, ch. 16; WOOD, *supra* note 105, at 356.

134. *But see* THE FEDERALIST NO. 14 (James Madison) (comparing the current dimensions of the country to European countries with representative systems).

135. Thomas Jefferson, *Notes on the State of Virginia* 156–57 (1785), *quoted in* THE NATIONAL EXPERIENCE, *supra* note 53, at 117 (1980); *see also* DIVIDED BY GOD, *supra* note 55, at 58 ("The common purpose necessary to sustain a republic called for shared knowledge and common moral values, neither of which could be taken for granted in a changing America."). Jefferson's concern seems relatively unobjectionable in the context of Montesquieu's theory of republics and the political problems faced by the framers. Nevertheless, this quotation is perhaps the first example of a sentiment that could be construed less positively, namely, as anti-immigrant and assimilationist. *See infra* Parts III.B. & V.B.

136. *See, e.g.,* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 295 (1966) (comments of James Madison, July 14) (discussing the "real division of interests" between free states and slave states); TYACK, JAMES & BENAVIDOT, *supra* note 41, at 28 (discussing the heightened fears created by the westward expansion of the republic).

137. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 33–34 (1996); KAESTLE, *supra* note 44, at 5.

138. TYACK, JAMES & BENAVIDOT, *supra* note 41, at 32.

139. *Id.* at 32–33.

thought Jefferson, Webster, and Rush, should be a system of uniform schooling.¹⁴⁰ According to Rush, a system of uniform schooling “will render the mass of people more homogeneous, and thereby fit them more easily for uniform and peaceful government.”¹⁴¹ Both Jefferson and Rush proposed systems of state-administered schooling to serve this end, involving free primary schools, grammar schools (similar to secondary schools), state colleges, a university, and a library.¹⁴² Along with Jefferson and Rush, Washington also believed that the federal government should establish and administer a national university—graduation from which, Rush suggested, might be required to serve in the federal government.¹⁴³ The view that systematic schooling was necessary to promote homogeneity and preserve the republic was widespread among the founding generation.¹⁴⁴ David Tyack has referred to the view that preserving liberty requires homogeneity as the “educational paradox” of the founding generation.¹⁴⁵

3. *Early plans for state education*

The interest in a uniform system of schools brought with it the first real plans for state control of education.¹⁴⁶ Thus, contrary to the recent suggestions of several legal scholars, the framers certainly did anticipate state-administered and state-

140. See THE NATIONAL EXPERIENCE, *supra* note 53, at 109-11; see also TYACK, JAMES & BENAVIDOT, *supra* note 41, at 23-24.

141. BENJAMIN RUSH, ESSAYS, LITERARY, MORAL AND PHILOSOPHICAL 7-8 (2d ed. 1806).

142. THE NATIONAL EXPERIENCE, *supra* note 53, at 104, 109, 116-17. The inclusion of secondary and post-secondary schooling shows that Jefferson (and Rush) believed there to be a significant state interest in higher education, contrary to the suggestion of the Supreme Court in *Yoder*. See *Yoder*, 406 U.S. at 226 n.14 (“[I]t is clear that, so far as the mass of the people were concerned, [Jefferson] envisaged that a basic education in the ‘three R’s’ would sufficiently meet the interests of the State.”). To be sure, Jefferson did not state that such education should be mandatory.

143. TYACK, JAMES & BENAVIDOT, *supra* note 41, at 37 (noting that the first six Presidents of the United States all called for such a university); cf. THE NATIONAL EXPERIENCE, *supra* note 53, at 127 (observing that some founders believed that the federal government did not have the power to establish a university).

144. THE NATIONAL EXPERIENCE, *supra* note 53, at 124-25 (discussing a 1795 essay contest by the American Philosophical Society on education).

145. TYACK, JAMES & BENAVIDOT, *supra* note 41, at 41.

146. In the 1630s, Massachusetts Bay established several schools (some of which were supported in part by public funds), founded Harvard, and famously required households to teach basic skills, and towns over a certain population to maintain a school; however, the mandatory education laws were rarely enforced. THE COLONIAL EXPERIENCE, *supra* note 53, at 14-16, 180-88.

funded school systems.¹⁴⁷ Plans put forward by Jefferson in Virginia and Rush in Pennsylvania envisioned an increased state presence in both school funding and curriculum.¹⁴⁸ For example, Jefferson's plan divided Virginia into educational "hundreds" or wards, and established a primary school in each hundred.¹⁴⁹ Attending primary school was to be free and tax-supported for three years, and thereafter require payment of tuition.¹⁵⁰ The curriculum would consist of reading, writing, basic arithmetic, and history.¹⁵¹ Some controls were placed on textbooks (they had to teach history), and teachers were appointed by "overseers," superintendent-like officials in charge of ten schools.¹⁵² Jefferson's bill also established twenty higher grammar schools, to which tax-funded scholarships would be available for the best primary school students demonstrating need, and which would teach Latin and Greek, English grammar, geography and advanced arithmetic.¹⁵³ Finally, scholarships would also be available for the best grammar school students to attend college at William and Mary.¹⁵⁴ Thus, Jefferson's bill included state taxes for schooling, set primary and grammar school curricula and restricted local control of textbooks and teacher hiring. In each respect, the plan differed from the practices of schooling dominant in America at the time. As Lawrence Cremin put it, Jefferson's plan represented an effort to transfer control of education outside the home from private religious organizations (mostly churches) to state organizations, the schools.¹⁵⁵ The state, thought Jefferson, was the most

147. See NUSSBAUM, *supra* note 55, at 217–18 ("When America's tradition of religious fairness got going, there were no public schools, and so the framers, not surprisingly, had nothing to say about how public education could shape young citizens for a society in which all are treated with equal respect."); DIVIDED BY GOD, *supra* note 55, at 56, 70–71 ("If the framers had anticipated a forum in which the government would state, promulgate, and embody American values while teaching children its version of the good life, they might have given constitutional attention to the role of religion in such a context.").

148. For a brief description of the plans, see KAESTLE, *supra* note 44, at 8–9; THE COLONIAL EXPERIENCE, *supra* note 53, at 440; THE NATIONAL EXPERIENCE, *supra* note 53, at 107–17.

149. *A Bill for the More General Diffusion of Knowledge*, *supra* note 130, ¶ 4.

150. *Id.* at ¶ 6.

151. *Id.*

152. *Id.* at ¶¶ 6–7.

153. *Id.* at ¶¶ 12–13, 16.

154. *Id.* at ¶ 19.

155. THE COLONIAL EXPERIENCE, *supra* note 53, at 442.

appropriate institution for imparting the kind of civic virtue necessary for the republic to survive.¹⁵⁶

Virginia disagreed. Not seeing the need for such a system, the Virginia Assembly rejected Jefferson's bill six times, and Jefferson did not live to see the creation of a free primary school system.¹⁵⁷ Resistance centered around the property taxes required to fund the plan, as well as the alleged difficulty of administering it.¹⁵⁸ In 1818, nearly thirty years after *A Bill for the More General Diffusion of Knowledge* was first introduced, the state finally created a system of free schooling, but only for the poor.¹⁵⁹ This result was by no means unusual for the time. Benjamin Rush's reform proposal suffered a similar fate in Pennsylvania.¹⁶⁰ Coeval efforts by the state legislature to mandate free schooling in Massachusetts went unenforced; a law establishing local schools passed by the New York legislature was underfunded and lasted only four years.¹⁶¹ While some states admitted to the Union at the turn of the century, such as Ohio, Indiana and Mississippi, included educational clauses in their state constitutions, the language was rhetorical, hortatory, or merely announced a broad educational purpose, without providing for specific school regulations.¹⁶² The only successful state regulation of education occurred in Connecticut, where in 1795 the legislature created

156. *Id.*

157. The bill was rejected by the House in 1778; rejected by the House in 1780; rejected by the Senate in 1785; rejected by the House in 1786; passed in a modified, purely hortatory form, in 1796; and adopted in part and amended in part in 1818, creating the University of Virginia. See THE NATIONAL EXPERIENCE, *supra* note 53, at 107–12.

158. *Id.* at 108; KAESTLE, *supra* note 44, at 9.

159. THE NATIONAL EXPERIENCE, *supra* note 53, at 110. Notably, other parts of Jefferson's education plans were eventually realized. *Id.* at 112 ("By the time of Jefferson's death in 1826, a substantial portion of his program for education had come to pass. The church had been disestablished . . . ; a university had been founded under public auspices; and a press that had consistently extended its freedom . . . was daily performing its vital—if cacophonous—function of public enlightenment. But the great library at Richmond had not been built More importantly, perhaps, the system of free primary schools envisioned in the Bill for the More General Diffusion of Knowledge had not been established.").

160. KAESTLE, *supra* note 44, at 9.

161. *Id.* at 10.

162. TYACK, JAMES & BENAVIDES, *supra* note 41, at 30, 54–55. See OHIO CONST. OF 1802, art. VIII, § 25; IND. CONST. OF 1816, art. IX; MISS. CONST. OF 1817, art. VI, § 16 ("Religion, morality and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools, and the means of education, shall forever be encouraged in this State.").

a permanent school fund with receipts from the sale of the state's Western Reserve Territory.¹⁶³ The resultant fund became so large that taxation proved unnecessary to support local schools after 1820.¹⁶⁴ Elsewhere, the dreaded enemy of the republic, localism, prevailed in the state legislatures.¹⁶⁵

The resistance these proposals faced is, in some respects, unsurprising. After all, resistance to centralized control and taxation were firmly entrenched in the American politics of the revolutionary generation.¹⁶⁶ Local self-government was a central part of political *liberty*—the liberty that republicans believed education necessary to protect.¹⁶⁷ As Carl Kaestle put it, “The very devotion to liberty that schooling was designed to protect also made local citizens skeptical of new forms of taxation by the state, and of new institutional regulation by the central government.”¹⁶⁸ Thus, the “republican” vision of a common, state-administered school ran headlong into a concern about liberty.

Importantly, it does not seem to have been a concern with *religious* liberty that motivated the opposition. There is no evidence that founding-era school opponents were moved by the concerns that, as Michael McConnell has shown, led the Baptists and Presbyterians to support both state disestablishment and eventually the federal Free Exercise Clause.¹⁶⁹ This is despite the fact that some of the early school proposals were expressly religious. Rush, for example, recommended the use of the Bible to give moral instruction and defended his school proposal on the grounds that it would be beneficial to religion.¹⁷⁰ However, while the textual sources proposed by Rush were religious, their significance was primarily *civic*; as Rush conceived of public schooling, its purpose was to educate future leaders, improve citizens, homogenize the population, and encourage individuals to act in ways that promoted the public good, rather than to

163. KAESTLE, *supra* note 44, at 11.

164. *Id.*

165. See THE COLONIAL EXPERIENCE, *supra* note 53, at 443.

166. KAESTLE, *supra* note 44, at 9.

167. *Id.*

168. *Id.*

169. See McConnell, *supra* note 57, at 1439–43.

170. RUSH, *supra* note 108, at 1, 20–21, 82, 93–113 (describing the purpose of education).

proseyltize.¹⁷¹ For the most part, the political struggle over founding-era proposals for school reform seems to have focused not on the religious content of the schools, but on who controlled them: states or localities.¹⁷²

There were more mundane sources of opposition to school plans as well. As David Tyack has argued, the Virginia planter society took a very different attitude towards education than did the religious communities of New England.¹⁷³ For planters hoping to be gentlemen, formal instruction was a means of polishing their character, and was of little utility to the plantation agricultural economy.¹⁷⁴ Thus, it would not have been in planters' interests to fund a state-administered primary school system.¹⁷⁵ Moreover, there was little agreement about the best means of providing for education and whether the existing institutions were sufficient.¹⁷⁶ In the latter half of the eighteenth century, schooling remained ancillary to the education provided in the home and, to a declining extent, at church.¹⁷⁷ What education demanded of the *state* was unclear. Taken together, the opposition—including the principled resistance to state taxes, the distrust of state government and preference for local control, the cultural role of education in Virginia in particular, and the doubtful necessity of state administration in education—proved too formidable a political barrier for the systematic educational reform that Jefferson and Rush envisioned.

C. Educational Practices in the Early Republic

In contrast to Jefferson's grand plans, the educational institutions dominant in the early republic were variegated and highly local.¹⁷⁸ The vast majority of schooling took place outside of urban centers. As the western edge of the country expanded in the late eighteenth and early nineteenth centuries, people left cities and America became more rural. In 1790, over ninety-five percent of Americans lived in

171. See THE NATIONAL EXPERIENCE, *supra* note 53, at 139; see *infra* Part III.

172. See THE COLONIAL EXPERIENCE, *supra* note 53, at 443; KAESTLE, *supra* note 44, at 9–10, 22.

173. DAVID L. TYACK, TURNING POINTS IN AMERICAN EDUCATIONAL HISTORY 34 (1967).

174. *Id.*

175. *Id.* at 28–49.

176. TYACK, JAMES & BENAVIDES, *supra* note 41, at 15.

177. See THE COLONIAL EXPERIENCE, *supra* note 53, at 480, 491.

178. TYACK, JAMES & BENAVIDES, *supra* note 41, at 26.

settlements of fewer than 2,500 people; by 1830, this was still true of ninety-one percent of the population.¹⁷⁹ In rural settings in the North and Midwest, the “district” school system predominated.¹⁸⁰ District schools were usually one-room clapboard houses built on unusable land, like a swamp or a fallow field.¹⁸¹ Children began attending school as young as two or three years of age.¹⁸² Discipline appears to have been the primary focus for the youngest attendees, who were there mostly to free up their parents; but other students enjoyed a pedagogical mixture of rote memorization and copying examples.¹⁸³ Generally, one teacher taught all of the pupils. While they sometimes tried to separate children into classes based on the difficulty of their textbooks, this was difficult because families provided the textbooks, and they were often different among students of the same level.¹⁸⁴ Using spellers like Webster’s or Thomas Dilworth’s *A New Guide to the English Tongue*, students first memorized the alphabet, then strings of vowel-consonant syllables (like “ab, eb, ib, ob, ub”) and one-syllable words.¹⁸⁵ When students could read, they read predominantly “authorized catechism”—selections from the Old and New Testaments—as well as “lore, counsel, and rhyming epigrams of a religious character.”¹⁸⁶ The religious exercises and the teaching of foreign language varied from district to district, depending on majority preference.¹⁸⁷ Writing, arithmetic, and geography were also taught.¹⁸⁸ Discipline usually meant corporal punishment, which many teachers were “harsh and frequent” in administering.¹⁸⁹

Funding was largely patchwork and varied from district to district. School districts in the North and Midwest were financed in part by local property taxes, overhead and fuel

179. KAESTLE, *supra* note 44, at 13.

180. *Id.*

181. *Id.* at 13–15.

182. *Id.* at 15–16.

183. *Id.* at 17.

184. *Id.*

185. *Id.* at 16; THE COLONIAL EXPERIENCE, *supra* note 53, at 500–01.

186. THE COLONIAL EXPERIENCE, *supra* note 53, at 501.

187. KAESTLE, *supra* note 44, at 17.

188. *Id.* at 17; *see also* THE COLONIAL EXPERIENCE, *supra* note 53, at 501–05 (describing the approach to teaching arithmetic, the rule of threes, as well as providing examples of the writing workbooks).

189. KAESTLE, *supra* note 44, at 13.

contributions, tuition payments, and state aid.¹⁹⁰ In some cases, teachers received their pay directly from patrons.¹⁹¹ Federal land grants for financing primary education were available to settlers in western states as early as the 1780s and 90s, but early on, the system was marred by waste, mismanagement and corruption.¹⁹² Schools in the South often charged "subscription" rates to the families of attending pupils.¹⁹³ In any case, the contemporary distinction between private and public schools did not exist, and methods of funding varied from community to community, depending on the political culture and the circumstances.¹⁹⁴

Not only did localities effectively control curriculum and funding, they also controlled teaching. Teaching in the late eighteenth and early nineteenth centuries was bad work.¹⁹⁵ School was in session for only ten weeks during the winter and the summer, making it necessary for many teachers to find other work during the breaks.¹⁹⁶ In most cases, pay was poor, and turnover was high. Minimal training was required, and indeed teachers usually arrived with no qualifications whatsoever, sometimes only slightly better educated than their students.¹⁹⁷ In New York, for example, "some local communities had certified teachers who could not even add."¹⁹⁸ According to one school reformer, speaking in 1842, "at least four fifths of the teachers in the common schools in Illinois would not pass an examination in the rudiments of our English education, and most of them [had] taken to teaching because they hadn't anything in particular to do."¹⁹⁹ But, free from state credentialing requirements or review, localities could hire whichever teachers they wanted.²⁰⁰ They exercised further control by boarding teachers with local families. Families used the opportunity not only to inquire, offer advice, and complain about school, but to "monitor" teachers' personal lives as

190. *Id.*

191. THE COLONIAL EXPERIENCE, *supra* note 53, at 500.

192. See TYACK, JAMES & BENAVIDES, *supra* note 41, at 32, 38–40.

193. KAESTLE, *supra* note 44, at 13.

194. *Id.* at 13.

195. See *id.* at 20–21.

196. *Id.* at 20.

197. *Id.*

198. *Id.* at 21.

199. *Id.*

200. *Id.* at 22.

well.²⁰¹ Conditions were slightly different in the South, where itinerant schoolmasters predominated. Sometimes, itinerant teachers would arrive in town of their own accord, locate a schoolhouse, solicit pupils, and set tuition rates; elsewhere in the South, teachers were invited to town by parents to teach in the local "old-field" school.²⁰² In all cases, however, parents in the early republic had broad control over the hiring of teachers. Parents used that control to select teachers whose religious beliefs and native language matched their own, to help maintain the cultural identity.²⁰³ As a result, teachers did not need credentials to provide rural districts with the services they desired: rudimentary instruction and child care at a very low cost.²⁰⁴ And in fact, the rural district school system was relatively well attended and the population enjoyed a high rate of literacy.²⁰⁵ Between 1750 and 1835, rural enrollments—already higher than those in urban schools—increased.²⁰⁶

Much like rural schooling, urban schooling before the 1820s involved a patchwork of different organizations, from boarding schools, tutors, and independent pay schools, to "dame schools" for young women, apprenticeship, and church charity schools.²⁰⁷ Most of the educational burden was met by the independent pay schools.²⁰⁸ These schools charged fees within the reach of three-fourths of the city population, but tuition did exclude members of the working poor, such as day laborers, who could not afford the three to four dollar charge per quarter.²⁰⁹ Church charity schools, and later Sunday schools, filled the gap.²¹⁰ The earliest church charity schools were funded by donations and limited to children of the congregation's members.²¹¹ They taught rudimentary skills, focusing primarily on literacy, the memorization of scripture,

201. *Id.*

202. *Id.* at 13.

203. *See id.* at 17 (describing instruction in foreign languages and variations in religious exercises).

204. *Id.* at 20.

205. TYACK, JAMES & BENAVIDES, *supra* note 41, at 26; KAESTLE, *supra* note 44, at 24; *see also* THE COLONIAL EXPERIENCE, *supra* note 53, at 546.

206. KAESTLE, *supra* note 44, at 27.

207. *Id.* at 30–31.

208. *Id.* at 30, 52.

209. *Id.* at 30, 53.

210. *Id.* at 30–31.

211. *Id.* at 31.

and the morality of the denomination.²¹² As city populations began to grow at the turn of the century, however, charity schools began to reach beyond the confines of their own congregation to the city poor.²¹³ The voluntary associations, common in America at the time, played a large role in extending charity school services, using a combination of tax revenue and donations.²¹⁴ In Philadelphia, for example, the Society for the Free Instruction of Female Children opened a school for poor girls in 1796.²¹⁵ A similar group, the Female Association, opened a girls' school in New York in 1801.²¹⁶ Women were well represented in the educational voluntary associations, as were Quakers. Quakers dominated the New York Manumission Society, which opened a school for black children in 1787.²¹⁷ Quakers also established the New York Free School Society in 1805, with the explicit aim to provide education for the city's poor on a much larger scale.²¹⁸ Employing the innovative Lancasterian pedagogy, in which older students taught younger students, the Free School Society was able to educate hundreds of students in its school.²¹⁹ Nevertheless, until the 1830s, the independent pay schools continued to serve more children than the charity schools.²²⁰

The ideology of the charity schools was very different from that of the rural district schools and the urban independent pay schools. Whereas the district schools were controlled primarily by parents, who hired teachers, provided textbooks, and determined how long children would remain in attendance, charity schools were controlled by trustees, who sought to interpose the school between the child and the parent.²²¹ According to Kaestle, charity schools were in fact "*antagonistic*

212. *Id.* at 31–32.

213. *Id.* at 32.

214. *Id.* at 40.

215. *Id.*

216. *Id.* at 31–32.

217. By 1810, "African free schools" spread to cities in New Jersey, Rhode Island and Delaware. *Id.* at 38.

218. KAESTLE, *supra* note 44, at 40.

219. *See id.* at 40–41.

220. *Id.* at 52.

221. *Id.* at 39, 55 ("Unlike rural district schooling, urban charity schooling was designed to intervene between parents and children, to introduce children to a culture and morality that reformers believed was different than their parents.'").

to the child's family and peer influences."²²² Charity school trustees took this attitude because they believed poverty was a moral failing and that poor parents had become poor because of their bad character. They feared that, if left unaddressed, parents would impart character and habits to their children, who would remain impoverished.²²³ As the *New York Daily Advertiser* suggested in 1791, the poor "seldom keep any government in their families," and their children "unavoidably contract habits of idleness and mischief and wickedness."²²⁴ Widespread poverty would in turn generate the crime, social tension, and political disaffection increasingly characteristic of the cities.²²⁵ The solution was to break the cycle by replacing the influence of parents' influence with the morality of the church.²²⁶

It was from the church-operated city charity schools that the American common school system developed. Common school reformers altered the republican theory of education by drawing on the ideas of the Second Great Awakening, transforming an education in public virtue to instruction in Protestant morals. In the 1830s, 40s and 50s, vast numbers of immigrant Catholics arrived in American cities. They objected to a program of moral education that was, in effect, Protestant.

III. THE DEVELOPMENT OF THE COMMON SCHOOLS

Although Jefferson and Rush's plans ultimately failed, the balance struck by state legislatures in favor of locally controlled schools and against free school systems was not

222. *Id.* (emphasis added).

223. *Id.* at 32.

224. NEW YORK DAILY ADVERTISER, Jan. 27, 1791, quoted in KAESTLE, *supra* note 44, at 32; Horace Mann, *On Childhood in the Cities and the Fatherhood of God*, in TURNING POINTS IN AMERICAN EDUCATIONAL HISTORY 134-135 (David Tyack ed., 1967) ("And as I see the poor and neglected children in the streets, or in their own wretched houses, and how they live and grovel in low practices, gradually losing the sweet innocence of infantile expression, and becoming coarse and violent, even brutal, I wonder still at the torpidity of society upon this subject. . . . The sort of education they get in cities, where life is stirring briskly around them, and each one seems scrambling to get the best morsel for himself, only makes them worse, unless something is done to evoke order for them out of this chaos.").

225. KAESTLE, *supra* note 44, at 32-33, 36 (noting that leaders "justified charity schooling on grounds of stability").

226. *Id.* at 32-33, 39 ("Education would help reduce crime and vice while it muted cultural differences"); *id.* at 47 ("One of the central goals of charity-school workers was to rescue children from an allegedly harmful family environment.").

immutable. Legislators' votes reflected, in part, a judgment that a state system was unnecessary, since the hodgepodge of district schools, itinerant schoolmasters, private tutors, and independent pay schools were doing the job.²²⁷ However, the assumptions on which this judgment rested proved unstable. Social circumstances were changing, and as they changed, they upset the judgment that state schooling was unnecessary. Two of these changes are especially significant.

A. Westward Expansion and the Birth of Federal School Regulation

First, westward expansion dramatically increased in the nineteenth century. Kentucky, Tennessee, and Ohio were admitted to the Union at the turn of the century; one year after Ohio became a state, the Louisiana Purchase vastly increased the size of the country.²²⁸ Over the next sixty years, seventeen states joined the Union.²²⁹ The climate, geography, and resources of these new interior western states differed from the eastern states. Their economies differed as well; the West became an agricultural region (like the South), while, by the 1840s, the Northeast had transformed into a manufacturing region.²³⁰ In addition, some of the people who settled the West were very different from the dominant ethnic and cultural groups of the eastern states. In the upper Midwest, for example, Wisconsin was settled in large part by German Catholics and Lutherans, some of whom immigrated together as entire communities and exhibited a strong interest in preserving their native language and culture.²³¹ These immigrants constituted a large portion of the state. By 1890, thirty-seven percent of Wisconsin's population was either born in Germany or had one parent born there.²³² Together with the

227. *Id.* at 9.

228. See TYACK, JAMES & BENAVIDES, *supra* note 41, at 56; notably, the Louisiana Purchase was initially regarded as illegal by Spain and Britain, and was not acknowledged until 1819. HOWE, *supra* note 54, at 16, 108.

229. See TYACK, JAMES & BENAVIDES, *supra* note 41, at 56.

230. See KAESTLE, *supra* note 44, at 63.

231. See Thomas C. Hunt, *The Bennett Law of 1890: Focus of Conflict Between Church and State in Education*, 23 J. CHURCH & ST. 69, 84-85 (1981).

232. *Id.* at 85 (citing U.S. IMMIGRATION COMMISSION, REPORTS OF THE IMMIGRATION COMMISSION: STATISTICAL REVIEW OF IMMIGRATION, 1820-1910 - DISTRIBUTION OF IMMIGRANTS, 1850-1900 522 (Washington, D.C.: Government Printing Office 1911) [hereinafter IMMIGRATION]).

Irish, English and other immigrant populations, seventy-four percent of Wisconsin was either foreign-born or had at least one foreign-born parent. Wisconsin's immigrant population was considerable, but hardly extreme at the time; in 1890, the state ranked third in the number of eligible voters from foreign countries.²³³

The differences between the expanding West and East raised old worries about obedience, loyalty, and mutual understanding between citizens and federal leadership in Washington.²³⁴ In response, both federal and state governments began to place more emphasis on schooling. Uniform school systems teaching a standard curriculum would impart American virtues and the English language, effectively homogenizing the next generation.²³⁵ Fully "Americanized," the new immigrant groups would feel greater loyalty to the union. As the U.S. House Committee on Public Lands put it in 1826, when it recommended that half of all proceeds from the sale of public lands go to funding common schools, education "improve[s] . . . the minds and morals of the present generation, and of generations to come"—an important task because it "contemplates giving additional stability to the government, and drawing round the republic new and stronger bonds of union."²³⁶ So justified, all citizens had an interest in building in their states uniform systems of common schools for all children.

The emphasis placed on schooling had legal ramifications at both the federal and state levels. At the federal level, land grants for public schooling became more common and better administered as the century progressed.²³⁷ School land grants had been part of the township system since the federal Land Ordinance of 1785, under which "lot 16" of a township was to be used "for the maintenance of public schools."²³⁸ Article III of the Northwest Ordinance of 1787 also "encouraged" the citizens of the territory to establish "schools and the means of education."²³⁹ Nevertheless, before the turn of the century,

233. *Id.* (citing IMMIGRATION, *supra* note 232, at 471).

234. TYACK, JAMES & BENAVIDOT, *supra* note 41, at 28.

235. *Id.* at 28–29.

236. HOUSE COMMITTEE ON PUBLIC LANDS, 1826 REPORT, *quoted in* TYACK, JAMES & BENAVIDOT, *supra* note 41, at 28.

237. TYACK, JAMES & BENAVIDOT, *supra* note 41, at 21–22.

238. *Id.* at 31.

239. Northwest Ordinance of 1787, art. III.

school land grants were sometimes omitted, “mismanaged or squandered.”²⁴⁰ At first, Congress viewed school land grants as bargaining chips to induce western settlement; when buyers failed to request them, Congress sometimes omitted the grants.²⁴¹ Even when school grants were provided, few federal restrictions were imposed on their use, and the resources were often diverted to uses other than schooling.²⁴² Townships, trying to decide whether to rent or sell the property, discovered that renters had little incentive to improve the property and that immediate sale of the land was often for very little money.²⁴³

By the latter part of the nineteenth century, this system had transformed in several important ways. Land buyers began to view public school grants as entitlements, and expected Congress to provide them in all sales.²⁴⁴ In 1848, Congress in fact increased the amount of land for schools from one lot to two lots, setting aside “5.5% of the public domain” in California for education.²⁴⁵ Congress began to provide new states with cash grants in addition to land, reserving a portion of proceeds from the sale of the public domain for use in state common school funds.²⁴⁶ Administrative controls also evolved. In 1847, the Commissioner of Public Lands issued instructions detailing lawful means for selecting, registering and selling federal land grants for schools.²⁴⁷ The agency also began to hear and decide land grant disputes, as did the federal courts.²⁴⁸ Finally, Congress used gifting of the federal domain as a bargaining chip to implement policies it could not enact directly.²⁴⁹ Conditional land grants enabled the federal government to achieve changes in school policy at the *state* level, as well.

Changes at the state level were felt first in constitutions, whose educational provisions grew in the nineteenth century from largely ineffectual rhetorical flourishes into explicit

240. TYACK, JAMES & BENAVIDES, *supra* note 41, at 21.

241. *Id.* at 32.

242. *Id.* at 38–40.

243. *Id.* at 40–41.

244. *Id.* at 34.

245. *Id.*

246. *Id.*

247. *Id.* at 37.

248. *Id.*

249. *Id.* at 33.

controls on the use and sale of federal public land grants.²⁵⁰ By the second half of the nineteenth century, education regulations burgeoned, and states began to systematically regulate schooling. To understand this development, however, we need to consider a second major social change in the early nineteenth century United States.

B. Urbanization and the Common School Movement

1. Immigration and the growth of the city

The second social change that helped to tilt the balance in favor of state-administered school systems was the growth of the American city.²⁵¹ The growth of the city itself encompassed a cluster of changes, but most important was the dramatic increase in immigration between the 1820s and 1870s, in particular the immigration of Catholics from Ireland and Germany.²⁵² Catholics had not previously constituted a large segment of the population. In 1765, for example, there were approximately 25,000 Catholics in the English colonies, whose total population was around two million.²⁵³ Given the historical animosity between English Protestants and Catholics and the severe restrictions placed on Catholics by some colonial governments, this number is unsurprising. However, between the 1820s and 1850s, over two million Catholics arrived in the United States.²⁵⁴

Many of these immigrants arrived very poor and illiterate, and some did not speak English at all. They differed ethnically and culturally from earlier American immigrants.²⁵⁵ The Irish Catholics settled mostly in cities,²⁵⁶ including Boston, New York, Philadelphia, Baltimore, and further west in Detroit, St.

250. *Id.* at 55.

251. DIVIDED BY GOD, *supra* note 55, at 58 (2005); HOWE, *supra* note 54, at 454 ("What probably tipped the scales in favor of states assuming some responsibility for education was the growth of cities and towns.").

252. TIMOTHY WALCH, PARISH SCHOOL: AMERICAN PAROCHIAL EDUCATION FROM COLONIAL TIMES TO THE PRESENT 12 (1996).

253. *Id.*

254. See DIVIDED BY GOD, *supra* note 55, at 265–66 (discussing Irish immigration); cf. WALCH, *supra* note 252, at 23 (putting total Catholic immigration around 5 million for this period)

255. WALCH, *supra* note 252, at 24.

256. THE NATIONAL EXPERIENCE, *supra* note 53, at 376.

Louis, Cincinnati and Chicago.²⁵⁷ There they met many non-immigrant families who had also recently come to the city, especially in the Northeast. Those born in America were drawn to the cities by the same factory jobs that attracted immigrants, and relocation to the city was made easier by recent advances in transportation infrastructure.²⁵⁸ Together these forces filled the cities and altered national demographics. Between 1830 and 1860, the number of people living in cities of more than 2,500 grew from less than ten percent of the population to about twenty percent,²⁵⁹ rapidly increasing the population density of these areas. The increase in population density in turn served to heighten the problems of the city—class and ethnic tension, poverty, disease, crime—and placed a severe strain on what social services existed.²⁶⁰

Catholic immigration to the cities heightened old worries about social stability.²⁶¹ In part, this was simply due to the sheer number of immigrants and the effect of increased population density on city life.²⁶² Many immigrants arrived in the country impoverished, placing an immediate strain on hospitals, almshouses, and the system of charity schools administered by churches and voluntary associations.²⁶³ But more significantly, the Catholic immigrants of the 1820s–1870s were ethnically, culturally, and linguistically different from previous immigrants and from the population as a whole.²⁶⁴ This newfound diversity triggered a number of reactions, including discord, discrimination, and outright violence

257. Many German Catholic families settled in the country, although later German immigrants came to Milwaukee, St. Louis and Chicago. Chinese immigrants in the 1860s and 1870s settled mostly in the far west. *See THE NATIONAL EXPERIENCE, supra* note 53, at 376.

258. KAESTLE, *supra* note 44, at 69.

259. *Id.* at 63.

260. *See id.* at 70 (“Population density in large cities increased tensions and made social problems more visible.”).

261. *See id.* at 79–80 (“Americans of the 1830s and 1840s inherited from the revolutionary generation an anxious sense of the fragility of republican government. . . . [T]here were new forces to fear . . . manufacturing, foreign immigration, the decline of landholding, the fragmentation of Protestant religion, and the growth of cities.”).

262. *Id.* at 70 (discussing this issue separately).

263. *See id.*

264. *Id.* at 71–72 (“The presence of so many culturally alien people in antebellum America greatly reinforced the use of emerging public school systems to teach children a common English language and a common Protestant morality, much as earlier charity schools had been directed at those qualities of blacks or poor whites that educational reformers saw as undesirable or threatening.”).

between immigrants and the American-born.²⁶⁵

Discord in the cities proved a fertile ground for common school proposals. Drawing on republican theories of education, school reformers emphasized that a uniform system of schools would remove cultural conflict.²⁶⁶ "Common schools" open to all would assimilate new immigrants and resolve potential divisions before they occurred. School thus presented a "peaceful and seemingly democratic solution" to the social threat posed by the new influx of immigrants.²⁶⁷ According to Horace Mann, appointed in 1837 to be Secretary of the newly created Massachusetts Board of Education, the common school:

is capacious enough to receive and cherish in its parental bosom every child that comes into the world; and . . . [offers] seasonable supplies of counsel and guidance making security antedate danger. Other social organizations are curative and remedial; this is a preventive and an antidote; they come to heal diseases and wounds; this is to make the physical and moral frame invulnerable to them. Let the common school be expanded to its capabilities, let it be worked with the efficiency of which it is susceptible, and nine tenths of the crimes in the penal code would become obsolete; the long catalogue of human ills would be abridge; men would walk more safely by day; every pillow would be more inviolable by night; property, life, and character held by strong tenure; all rational hopes respecting the future brightened.²⁶⁸

Mann's belief that common schools would "kindle a spirit of amity and mutual respect that the conflicts of adult life could never destroy" is a recognizable extension of the republican view that common, institutionalized education would homogenize the population and thereby generate the obedience, loyalty and mutual understanding necessary for the survival of a large republic.²⁶⁹ Yet, the public received Mann's theory with different ears than had the founding generation. Whereas earlier American generations did not see the need for a

265. See, e.g., WALCH, *supra* note 252, at 26; KAESTLE, *supra* note 44, at 72.

266. THE NATIONAL EXPERIENCE, *supra* note 53, at 138; KAESTLE, *supra* note, at 72 (noting that Protestants of the time, like Americans of other generations, "looked to public education to resolve cultural conflict.").

267. KAESTLE, *supra* note 44, at 72.

268. HORACE MANN, COMMON SCHOOL JOURNAL, III 15 (1841), *quoted in* THE NATIONAL EXPERIENCE, *supra* note 53, at 137.

269. KAESTLE, *supra* note 44, at 99; THE NATIONAL EXPERIENCE, *supra* note 53, at 138; see also KAESTLE, *supra* note 44, at 69-70, 80.

common school system, the influx of immigrants and the growth of the city made Americans of the early nineteenth century more receptive.

2. Religion and the common school movement

Common school reformers also drew on the language and self-understanding of the contemporary religious revival in making their case.²⁷⁰ This is an essential difference between the common school movement and earlier plans for school reform. For example, where Jefferson and Rush believed that an education in *public virtue* was necessary to preserve republican government, Mann believed that it should be the schools' mission to impart *moral rectitude*.²⁷¹ The American Revolution, thought Mann, removed many political restraints on conduct. A moral reformation would be required to preserve the resulting system; without it, unchecked "human passion" would create anarchy and suffering.²⁷² Where Jefferson had described schooling's goal as imparting public virtue, or a disposition to promote the common good, Mann's descriptions were shot through with the Protestantism of the Second Great Awakening.²⁷³ As Lawrence Cremin describes it, "Mann's definition of what should be taught came remarkably close to the evangelical conceptions of the day—a common piety rooted in Scripture, a common civility revolving around the history and the state documents of a Christian Republic, and a common intellectual culture . . ."²⁷⁴ Such an orientation was widespread among common school reformers—some of whom were ministers themselves.²⁷⁵ Teachers, the reformers argued,

270. For a discussion of the Second Great Awakening, see generally HOWE, *supra* note 54.

271. THE NATIONAL EXPERIENCE, *supra* note 53, at 136, 138; KAESTLE, *supra* note 44, at 82.

272. THE NATIONAL EXPERIENCE, *supra* note 53, at 138–39.

273. *Id.* at 136–37, 139 ("In essence, Mann accepted the propositions of the republican style of educational thought and recast them in the forms of nineteenth-century nondenominational Protestantism."). Many of the urban common school reformers of the time associated their work with millennialism as well. See KAESTLE, *supra* note 44, at 49, 94–95.

274. THE NATIONAL EXPERIENCE, *supra* note 53, at 140; see also WALCH, *supra* note 252, at 26.

275. KAESTLE, *supra* note 44, at 96–99; see David Tyack, *The Kingdom of God and the Common School: Protestant Ministers and the Educational Awakening in the West*, 36 HARV. ED. REV. 447, 447 (1966) ("Across the nation, but especially in the new communities of the west, ministers accepted the founding and superintendence of schools as a traditional religious duty.").

had a duty to impart the common Protestant morals of self-control, deference, honesty, industry, frugality, and respect for private property and traditional family roles.²⁷⁶

One result of the focus on Protestantism among school reformers was a strong and sometimes vicious anti-Catholicism.²⁷⁷ Of course, anti-Catholicism was not uncommon in America at the time. According to a popular Boston minister, for example, the Catholic church was "the ally of tyranny, the opponent of material prosperity, the foe of thrift, the enemy of the railroad, the caucus, and the school."²⁷⁸ But as Kaestle has shown, anti-Catholicism played a large role in the ideology of common school reformers, who regarded American Protestantism as being naturally superior.²⁷⁹ In the eyes of many reformers, Protestants were responsible for the economic progress and political liberty the nation enjoyed, and only Protestant values should be taught in the schools.²⁸⁰

Common school reformers did attempt to remain neutral between Protestant denominations. Some of the strongest resistance to common school reform came from Protestants themselves.²⁸¹ Denominations had multiplied during the Second Great Awakening, and minority denominations were concerned that the doctrine of other denominations might be taught as part of the common school moral curriculum. As Noah Feldman has observed, this created a dilemma for Mann and the other reformers: without religion, school would not

276. KAESTLE, *supra* note 44, at 98 ("If the chief purpose of public common schooling was moral education, and if morality had to be grounded in religion, there had to be some way to have religion in the schools.").

277. Catholicism was associated with "degeneracy and ruin." *Id.* at 93.

278. *Id.*

279. *Id.* at 92-93.

280. On the role of religion in public schools, it is useful to contrast Mann with earlier school reformers, like Jefferson. Unlike Mann, Jefferson did not think common schooling and religious uniformity had to go hand in hand. He viewed his school reform proposals in the *Bill for the More General Diffusion of Knowledge* as complementary to the guarantees of religious liberty in the *Bill for Establishing Religious Freedom*. Thomas Jefferson, *A Bill for Establishing Religious Freedom*, § II (1779). As is well known, the latter bill barred compulsion in matters of conscience, as well as restraints and burdens on account of one's religious beliefs. *Id.* As Jefferson understood things, religious freedom was consistent with school reform because school reform aimed to foster public virtue, not the morals of a particular denomination, and a system of schools would impart the knowledge and sensibility with which individuals could freely arrive at sectarian religious commitments on their own. See THE COLONIAL EXPERIENCE, *supra* note 53, at 442. In contrast, common school reformers envisioned schools as compelling certain religious beliefs and dampening others.

281. DIVIDED BY GOD, *supra* note 55, at 62-63.

have its moral content; but religious doctrine would create denominational strife.²⁸² The solution to the conflict was the program of “non-denominationalism” or “non-sectarianism.”²⁸³ While denominations had doctrinal differences, they united on core moral commitments, and these were the kinds of commitments that school should impart.²⁸⁴ Mann believed that these commitments could be imparted by reading the Bible without any accompanying commentary.²⁸⁵ Reading the Bible without any comment would permit a student to judge the Bible “according to the dictates of his own reason and conscience.”²⁸⁶

The significance of non-sectarianism, however, can be overstated. Non-sectarianism excluded the millions of Catholics who had recently arrived in the country.²⁸⁷ More importantly—and essential to understanding the common school system—is that interference with the practice of minority religions was an aim of the common school system.²⁸⁸ The movement for common school reform was driven by anxiety over the newly arrived, diverse immigrants. The common-school solution to this anxiety was to assimilate the immigrants. Thus, the common schools were not intended to protect liberty of conscience or promote religious diversity, but to *counteract* them.²⁸⁹ In this way, the common schools were a recognizable extension of traditional republicanism, with its focus on public virtue and homogeneity.²⁹⁰ Only this view accounts for the fact that it was the Catholic opponents of the common school movement, not the proponents, who emphasized the importance of religious liberty.²⁹¹

These social changes—immigration, the growth of cities, and religious revivalism—combined with technological developments to give school reform proposals increased

282. *Id.* at 60–61.

283. *Id.* at 61.

284. *Id.*

285. *Id.*

286. *Id.* at 61–62.

287. *See* DIVIDED BY GOD, *supra* note 55, at 63–65.

288. *See, e.g.,* KAESTLE, *supra* note 44, at 163–64.

289. *See id.* at 63–64.

290. As Michael McConnell has shown, traditional republicanism was opposed to the movement for religious liberty by minorities during the Virginia assessment controversy. McConnell, *supra* note 57, at 1437.

291. *See infra* Part IV.

traction throughout the country. The primary effect of technological change was to bring distant parts of the country closer together. For example, as advances in communication and transportation cut down on rural insularity, the threat of instability perceived in the cities was perceived in rural regions as well.²⁹² Rural regions began to take economic interest in manufacturing regions. The development of an interregional system for the transportation of foodstuffs increased rural concern with the arithmetic and literacy necessary to participate in the market.²⁹³ Evangelizing state superintendents like Mann and John Pierce of Michigan "rode circuit" across their states, lecturing to audiences about the importance of state-regulated free school systems.²⁹⁴ They framed their claims for the importance of state schooling using the shared language of the contemporary religious movement. Together, these forces led to a series of changes in schooling practices, of which three are important here: the institution of attendance requirements, the rise of state educational agencies and officers, and the decline of "private" schools.²⁹⁵

3. *Changes in education policy*

First, attendance requirements were probably the least important of the common school reforms.²⁹⁶ The available evidence suggests that, at the time of reform, a large majority of eligible children in some states attended school at least sometime during the year. By 1850, around fifty percent of the children under the age of twenty attended school during the year in Massachusetts, New York, Michigan and Wisconsin.²⁹⁷ Considering that children under five and over fifteen typically did not attend school, the attendance rate was likely considerably greater than fifty percent of the target age range.²⁹⁸ Of course, these states were educational leaders, and many other states did not reach similar enrollment figures.

292. KAESTLE, *supra* note 44, at 66.

293. See HOWE, *supra* note 54, at 1, 5–6; KAESTLE, *supra* note 44, at 63–64.

294. THE NATIONAL EXPERIENCE, *supra* note 53, at 136; KAESTLE, *supra* note 44, at 157.

295. See KAESTLE, *supra* note 44, at 106, 111, 116.

296. See *id.* at 106 ("These data support what is apparent from the reformers' own statements—that enrollment was not the central concern of the common-school movement.").

297. *Id.*

298. *Id.* at 106–07.

Figures for Pennsylvania and New Jersey put enrollments at around twenty percent in 1840 and forty percent in 1860.²⁹⁹ When school reformers did focus on attendance, their concern was not with general enrollments but with particular groups, such as child workers, the children of freed slaves, and the perpetually truant.³⁰⁰ Child labor interfered with education mostly in immigrant communities, where many families needed income from an additional worker. Working conditions were often extreme, and children worked the same shifts as their parents.³⁰¹ In their familiar way, reformers argued that it damaged the nation's interests for children to go morally uninstructed. In some cases they succeeded in securing the passage of state legislation requiring education for factory children, or, in the latter half of the century, prohibiting child labor altogether. Many of these statutes, however, went unenforced.³⁰²

The second major category of state regulation achieved by common school reformers is the development of state educational agencies and officers. The first of these reforms was the development of state boards of education and state superintendents. Many of the common school reformers were appointed to these leadership positions: Horace Mann in Massachusetts and Henry Barnard in Connecticut led their state boards of education; John Peirce was the first state superintendent in Michigan.³⁰³ The power of these positions was at first quite minimal, confined to gathering data on educational practices in the state.³⁰⁴ Where state superintendents were given larger powers, such as hearing appeals in educational disputes, local officials often failed to comply with their orders.³⁰⁵ Nevertheless, these early leaders appear to have had a strong influence, at least in some states, on the development of state educational authority. This influence came not from their statutory power, but from the power of their personalities and their extended popular campaigns for school reform. Horace Mann was particularly

299. *Id.* at 106.

300. *Id.* at 107.

301. *See id.* at 107-08.

302. *Id.* at 108-09.

303. *Id.* at 111-113.

304. *Id.* at 114.

305. *Id.* at 115.

respected; a later state superintendent referred to him as the "Puritan of Puritans," and claimed that Mann was "born to be a champion."³⁰⁶

State officials used their persuasive power to press for legislation increasing state control over education. Some of these efforts were successful, and some were not.³⁰⁷ Most states created state school funds, and, as discussed above, provided for the deposit of federal land grant receipts into those funds.³⁰⁸ Many states also pushed for an office of county superintendents, who would interpret state education laws, ensure reports were made to state agencies, encourage uniformity of textbooks, and examine the qualifications of teaching candidates.³⁰⁹ The office of county superintendents was a controversial innovation, and their implementation and authority were limited in many instances. Textbook reform also proved challenging, in part because some parents resisted replacing family textbooks with state or county-recommended books.³¹⁰ Textbook uniformity was not widely achieved until school districts began to purchase texts themselves, in the latter half of the nineteenth century.³¹¹ These developments were piecemeal; reformers, however, were concerned with providing the kind of uniformity that only state regulation could accomplish, since uniformity would improve the consistency of school quality³¹² and promote the interest in assimilating diverse communities.³¹³ With extensive campaigning, they achieved many of their goals by the 1890s, when most states had in place state boards, state and county superintendents, school funds, and control over teacher hiring, subjects taught, and textbooks.³¹⁴

The final category of change in this period was the decline of "private" schools. This point has to be made with some care, since the contemporary distinction between private and public schools did not exist until sometime in the middle of the eighteenth century. Before this time, schools were financed by

306. *Id.* at 114.

307. See TYACK, JAMES & BENAVIDOT, *supra* note 41, at 55.

308. *Id.*

309. KAESTLE, *supra* note 44, at 115.

310. See *id.* at 134.

311. *Id.* at 134.

312. *Id.*

313. *Id.* at 71, 156-57.

314. See TYACK, JAMES & BENAVIDOT, *supra* note 41, at 59.

a variety of sources. In the cities, independent pay schools and academies, which charged tuition, also received public money, as did religious charity schools.³¹⁵ Rural district schools were financed by a combination of property tax revenue and quarterly fees.³¹⁶ This began to change during the time of common school reform, and a public school-private school distinction crystallized.³¹⁷

School reformers believed that common schools could only provide the promised social and moral benefits if all children attended them. If a large number of children attended private schools, or if parents of a particular cultural group or class educated their children in schools for them alone, society would lose the mutual understanding that common schooling could produce.³¹⁸ Since common schools would have to be free to enable all to attend, the effort to bring everyone into free common schools took the form of an attack on "private" and religious schools. This attack took different forms. Rhetorically, reformers began to characterize private and religious schools as "not republican."³¹⁹ Most interestingly, however, was the development in funding. New York is illustrative of funding changes that occurred in cities. In the 1820s, independent pay schools educated the majority of children in New York.³²⁰ In 1825, however, the New York Free School Society, which ran the largest charity school in the city, convinced the city council that public funds should not be distributed to denominational schools.³²¹ This cut funding to charity schools run by the Baptists and Catholics, severely limiting the ability of these schools to serve their communities. The Free School Society then became the "Public School Society," and opened its doors to everyone, not only the poor.³²² In 1832, attendance became free for all.³²³ This strategy drew students who would have gone to denominational charity schools and to independent pay schools. In fact, by 1850 the percentage of students attending

315. See KAESTLE, *supra* note 44, at 51, 57, 119; see also TYACK, JAMES & BENAVID, *supra* note 41, at 26.

316. KAESTLE, *supra* note 44, at 13.

317. *Id.* at 117.

318. *Id.* at 116.

319. *Id.* (quoting Orville Taylor).

320. *Id.*

321. *Id.* at 118.

322. *Id.* at 116.

323. *Id.* at 57-58.

private schools in New York had fallen from sixty-two percent in 1829 to eighteen percent.³²⁴ In rural regions, common school reformers accomplished the same end by attacking “rate bills,” which district schools used to charge parents tuition for attendance.³²⁵ Most northern states abolished rate bills by the middle of the nineteenth century.³²⁶ The only schools to successfully resist these attacks were the more expensive private academies.³²⁷ Even though common schools were now open to all, their charity school history did not immediately wear off, discouraging many wealthy families from sending their children to them.³²⁸

It was thus a change in circumstances, rather than a profound shift in educational theory, that precipitated the development of free common schools during the antebellum period. Republican concerns about the expanse of the country, cultural homogeneity and loyalty, and the necessity of a normative education remained important. To be sure, there were important changes in the educational theories of reformers. The rhetoric of school reformers crossed the boundary—if such a boundary can be maintained—between an emphasis on homogeneity and an emphasis on assimilating the alien.³²⁹ Jefferson’s education in public virtue was replaced by an education in Protestant morals, and American Pan-Protestantism became firmly implanted in the common school curriculum.³³⁰ More significant than this theoretical drift were the social and economic changes occurring in the country. Waves of immigration, the rise of cities, industrialization, and westward expanse all heightened traditional republican anxieties, to which school systems had been proposed as a solution. The development of markets, the construction of transportation infrastructure, and increased communication

324. *Id.* at 116.

325. *Id.* at 117.

326. *Id.*

327. *Id.* at 117–118.

328. *Id.* at 118.

329. Compare *id.* at 163 (describing the then-contemporary view of school as a “filter” to “cleanse” immigrants), with THE NATIONAL EXPERIENCE, *supra* note 53, at 117 (1980) (describing the concern with homogeneity among the founders). This distinction remains difficult and vitally important to draw today. See Ginger Thompson, *Where Education and Assimilation Collide*, N.Y. TIMES, Mar. 14, 2009, at A1.

330. See *supra* note 280 and accompanying discussion.

connected rural areas to the cities, helping to overcome the political localism that defeated earlier school reforms.

Taken together, these social and economic changes made school reform politically possible where it had proved impossible for Jefferson and Rush. Pro-reform Federalists and then Whigs were able to overcome the generally anti-reform Democrats, both at federal and state levels.³³¹ The result was the development of a state regulatory apparatus which had, at the time, "by far the largest number of employees and the biggest budget of any activity of government in peacetime."³³² David Tyack has described public education in the nineteenth century as the "fourth branch of state government."³³³ As we have already seen, this so-called "fourth branch" had a strong religious character.

IV. CATHOLIC SCHOOLS AND PARENTAL RIGHTS

A. Public School Curriculum and Catholic School Financing

While common school reformers, including Horace Mann, sought to establish a common school system with a non-controversial "Christian" curriculum,³³⁴ the result in most cases was a "non-sectarian" or "non-denominational" Protestant education, emphasizing the pan-Protestant values of industry, thrift, self-control, private property, and traditional family roles.³³⁵ Both Catholic communities and Protestant communities found much to object to in this curriculum.³³⁶

1. Public schools and the King James Bible

The most intractable of the curricular disputes famously concerned the use of the King James Bible.³³⁷ Since its

331. See TYACK, JAMES & BENAVIDES, *supra* note 41, at 45–46, 53; see generally KAESTLE, *supra* note 44, at 148–58.

332. TYACK, JAMES & BENAVIDES, *supra* note 41, at 45.

333. *Id.* at 44.

334. See KAESTLE, *supra* note 44, at 80; TYACK, JAMES & BENAVIDES, *supra* note 41, at 162.

335. KAESTLE, *supra* note 44, at 93.

336. *Id.* at 158; WALCH, *supra* note 252, at 26–30; see JOAN DELFATTORE, THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA'S PUBLIC SCHOOLS 15 (2004).

337. DELFATTORE, *supra* note 336, at 21, 34; WALCH, *supra* note 252, at 40–45; KAESTLE, *supra* note 44, at 168; TYACK, JAMES & BENAVIDES, *supra* note 41, at 163–64.

appearance 200 years earlier, the King James Version had been, as Joan Delfattore put it, "the icon of Protestantism."³³⁸ Its content bore the marks of denominational struggle. For example, the version in use during the 1840s referred to the Pope as "the man of Sinne," and expressly rejected papal authority. It attributed to the Catholic Church responsibility for the previous suppression of comprehensible translations and accused it of working to obscure religious truth. Perhaps more importantly, the King James Version contained no textual commentary, whereas Catholics believed that scripture should be accompanied with an authoritative commentary—something that the Catholic Douay Bible contained.³³⁹ Thus, when school boards made concessions allowing for the use of any Bible without commentary, they were not "concessions" designed to appease the Catholics.³⁴⁰ As the Catholics saw it, reading the Bible without commentary was not non-sectarian, but a "Protestant concept" and "was more dangerous than no [biblical] education at all."³⁴¹

Some Catholic parents demanded that their children be permitted to opt-out of reading the King James Bible, but this request was not always granted. Even where school districts asserted that children could opt-out, the procedure was not often enforced. Rumors circulated of unsympathetic teachers demanding compliance, whipping and humiliating students who protested to reading King James.³⁴² Nor was the King James Bible the sole curricular conflict between Protestants and Catholics. Besides Bible reading, a school day often included Protestant hymns, the Lord's prayer, and the Ten Commandments—a slightly different list of commandments for Catholics and Protestants. School textbooks contained ethnic and religious slurs, as well as blunt dismissals of Catholicism and the Catholic Church.³⁴³ The entire curriculum of the common schools—as was consistent with the ideology of common school reform—reflected a reflexive belief in the superiority of American Protestantism and the necessity of its

338. DELFATTORE, *supra* note 336, at 21.

339. *See id.* at 34–35.

340. *See* KAESTLE, *supra* note 44, at 169 (noting Catholic opposition to such a practice).

341. WALCH, *supra* note 253, at 28.

342. *See* DELFATTORE, *supra* note 336, at 33–35.

343. KAESTLE, *supra* note 44, at 222.

dominance to the survival of the republic.³⁴⁴

Disputes over the bible led to violence in Philadelphia in 1844.³⁴⁵ In an effort to prevent local school personnel from engaging in sectarian instruction, Philadelphia school officials issued a resolution prohibiting the introduction of religious material into the curriculum, unless approved by the school board.³⁴⁶ The board then proceeded to only approve the use of the King James Bible.³⁴⁷ The Irish Bishop of Philadelphia, Francis Patrick Kenrick, wrote a letter to the school board requesting that Catholic children be permitted to read from the Douay Bible and exempted from reciting the Lord's prayer.³⁴⁸ The school board responded that no child would be forced to read from the King James Version.³⁴⁹ After Catholic parents reported that children were still being forced to read the Bible and punished for non-compliance, Bishop Kenrick formally complained to the school board and asked again that Catholic children be permitted to read from Douay.³⁵⁰ This time, the school board responded by allowing children to read from "any Bible without note or comment"—ruling out the Douay—but also established penalties for teachers who forced children to read from King James.³⁵¹

Angry nativists spread the word that Catholics were trying to exclude Bible reading from schools altogether—a tactic not uncommon at the time.³⁵² They characterized the complaints as evidencing a Catholic plan to subvert the will of the majority to the commands of the Catholic Church.³⁵³ As nativists began to campaign for popular support in an upcoming election, they staged rallies in Philadelphia neighborhoods heavily populated by Irish. Residents attacked the rallies. On May 6, two thousand nativists rallied in Kensington, an Irish neighborhood north of Philadelphia.³⁵⁴ While they were seeking cover from a rainstorm, a Protestant boy was shot; a riot

344. *See id.* at 92–93.

345. *Id.* at 170.

346. DELFATTORE, *supra* note 336, at 33–34.

347. *Id.*

348. *Id.*

349. *Id.* at 34.

350. *Id.*

351. *Id.* at 34–35.

352. KAESTLE, *supra* note 44, at 170.

353. WALCH, *supra* note 252, at 45.

354. DELFATTORE, *supra* note 336, at 35.

erupted, with Catholics shooting from the rooftops and Protestants smashing windows and breaking down doors.³⁵⁵ The next day, three thousand nativists marched to Kensington, where they again fought residents and burned homes; the next day, two Catholic churches were burnt, despite efforts by city officials to intervene.³⁵⁶ Order was restored only after residents of the St. Augustine neighborhood—well-to-do Protestants—organized informal peacekeeping groups and patrolled.³⁵⁷

In the end, disputes between Catholics and Protestants over Bible reading in the common schools were primarily about control, not doctrine. The anti-Catholic attitude of the time was primarily nativist, and sought not merely to ensure that Protestant doctrine was taught in schools, but that the dominant religious and ethnic groups in America remained dominant.³⁵⁸ A religious xenophobia in part made up this view; nativists liked to spread worries of a Catholic fifth column, undermining the republic by taking orders from the pope. Whereas the King James Bible was everywhere associated with political liberty, the Douay Bible was an instrument for subjugating free people to the “Romish” church.³⁵⁹

But the battles had ethnic and cultural dimensions as well. Even where Irish Catholics attended common schools and complied with the curriculum, they were subject to verbal abuse as “paddies,” and targeted as requiring Americanization.³⁶⁰ In a debate with nativist lawyers representing the New York Public School Society, Bishop John Hughes of New York read from a book purportedly in the school library, *The Irish Heart*, which expressed worry that Irish immigration would make the United States into “the common sewer of Ireland.”³⁶¹ Outside the school, of course, discrimination against the Irish was widespread. Verbal abuse was common in the streets and in the press, according to which the Irish drank and fought, and refused to act American.³⁶² The dispute between Irish Catholics and Protestants in America’s

355. *Id.*

356. *Id.* at 35–37.

357. DELFATTORE, *supra* note 336, at 37–38; WALCH, *supra* note 253, at 48–49.

358. *See* DELFATTORE, *supra* note 336, at 19–21.

359. *Id.* at 19, 22.

360. KAESTLE, *supra* note 44, at 163.

361. *Id.* at 25–26, 168.

362. *See* DELFATTORE, *supra* note 336, at 19 (quoting DIANE RAVITCH, *THE GREAT SCHOOL WARS* 29 (1974)).

cities was thus, in large part, a battle for political recognition and equality. If the Irish could force common schools to include their Bible in its curriculum, it would show that they had to be accepted in the mainstream; conversely, Protestants were determined to keep the Bible out and the Irish marginalized.³⁶³

2. Public funding and Catholic schools

Apart from their struggles with the common schools, Catholics had also long maintained their own schools. This was difficult; Catholic immigrants were often poor and unable to provide their schools with financial support. In some places, tax revenues filled the gap. Catholic schools in Massachusetts, Wisconsin and Connecticut, for example, received public funds until the 1840s–1860s.³⁶⁴ Nevertheless, many of these schools could provide education to only a fraction of the Catholic population.³⁶⁵ In New York City, Catholic charity schools had received tax revenue until 1825, when the then-New York Free School Society convinced the Common Council that it should cease funding denominational schools.³⁶⁶ While the primary target was likely other Protestant denominations, like the Baptists, whose schools were competing with those of the Free School Society, the effects of the decision were felt by Catholics as well. For years afterwards, many Catholic schools suffered from extremely limited capacity and operated in church basements.³⁶⁷ The situation generated another well-known conflict in the history of Catholic education.

In 1841, Bishop Hughes, petitioned the New York City Common Council in request of public funds for Catholic schools.³⁶⁸ He argued that Catholics, like Protestants, paid taxes, and should enjoy tax support for their schools. It was no answer that Catholic schools were sectarian, since the Public School Society common schools were sectarian as well, and functioned to impart Protestant beliefs and morals. If the Common Council continued to deny funds to Catholic schools based on sectarianism, he said, it should deny funds to the

363. See WALCH, *supra* note 252, at 28; DELFATTORE, *supra* note 336, at 18–19.

364. KAESTLE, *supra* note 44, at 166.

365. See, e.g., WALCH, *supra* note 252, at 38 (describing Catholic schools in Boston).

366. See KAESTLE, *supra* note 44, at 57, 166.

367. WALCH, *supra* note 252, at 40.

368. KAESTLE, *supra* note 44, at 168.

common schools, as well.³⁶⁹ The argument infuriated the Public School Society, many of whose members were nativists, and rubbed raw the tensions in the city between immigrants and natives. After a raucous and vitriolic two-day debate on Hughes's petition, between Hughes and nativist lawyers, the Common Council denied funds on the grounds that the Catholic schools were sectarian.³⁷⁰ Hughes then turned to the state legislature, which, after several sessions, in 1842 took control over state education funds from the Public School Society—a voluntary association—and placed that control in the hands of popularly elected local school boards, some of which would be nominated by Catholics.³⁷¹

Elsewhere, the effort to support Catholic schools met with more success. In 1831, residents of Lowell, Massachusetts appropriated fifty dollars to establish a “separate school for the benefit of the Irish population.”³⁷² Residents at the town meeting felt that it made sense to provide denominational education for the growing Catholic population for the same reasons that they provided tax support for Protestant education in local schools. The town committee planned to jointly administer the school with religious leadership, as it did in the Protestant schools.³⁷³ Under the terms of their agreement, the school committee reserved the right to examine and appoint school teachers, prescribe textbooks and curriculum, and to “examine, inspect and supervise” the school.³⁷⁴ For their part, parish priests required that the board appoint only “qualified Catholics” to teaching positions, and that textbooks contain no anti-Catholic statements. Parishes provided the school buildings, and the school committee paid teachers. The system was a success; by 1835, Lowell had three tax-funded Catholic schools enrolling, together, almost 4,000 students. The agreement ended in 1852 when one Catholic parish invited the Sisters of Notre Dame to staff its school. The Lowell school committee refused to pay their salaries. Despite the unhappy conclusion, the Lowell plan gained renown and

369. DELFATTORE, *supra* note 336, at 16–17.

370. *Id.* at 26; WALCH, *supra* note 252, at 41.

371. DELFATTORE, *supra* note 336, at 27–29; WALCH, *supra* note 252, at 42.

372. WALCH, *supra* note 252, at 39.

373. *Id.*

374. *Id.*

was copied in other communities.³⁷⁵

In places where the Catholic population was greater, communities were better able to establish and maintain independent schools. The German Catholic population of the Midwest is perhaps the best example. As discussed above, German Catholics composed a large part of Wisconsin's population in the latter half of the nineteenth century. Wisconsin needed these settlers; unlike eastern states, it had to "recruit" immigrants inland with "cultural concessions."³⁷⁶ Moreover, immigrants who could afford to travel inland often had greater resources and were therefore better able to fund independent schools.³⁷⁷ Moreover, Germans in particular manifested a strong interest in establishing schools. Both German Lutherans and German Catholics saw schooling as the means for preserving their traditions and religion for future generations.³⁷⁸ This view also affected public schooling in the Midwest. German Catholics and Lutherans used their political and economic leverage to encourage the hiring of German teachers and instruction either in both English and German, or German alone.³⁷⁹

B. Legal Challenges and Catholic Parental Rights

Early contests between Catholics and Protestants over schooling were primarily political.³⁸⁰ In the case of New York City, the conflict involved the emergence of the Irish as a formidable political force, and was largely confined to op-eds, letters, debates, and finally, the ballot box.³⁸¹ In Philadelphia, of course, the conflict took to the streets. Yet in most cases, the logic of these early disputes was "majority rule."³⁸² Protestants regarded the common school curriculum as inoffensive and non-sectarian. Reading from the King James Bible, singing hymns, and reciting the Ten Commandments was simply how most Americans educated their children.³⁸³

375. *Id.*

376. KAESTLE, *supra* note 44, at 164.

377. *Id.*

378. *See* Hunt, *supra* note 231, at 85.

379. KAESTLE, *supra* note 44, at 165.

380. TYACK, JAMES & BENAVIDES, *supra* note 41, at 162.

381. DELFATTORE, *supra* note 336, at 18.

382. TYACK, JAMES & BENAVIDES, *supra* note 41, at 162–63.

383. *See* DELFATTORE, *supra* note 336, at 15, 20.

In contrast, the conflict over Wisconsin's compulsory attendance statute took on a legal dimension, as well. Most states did not enact such statutes until the early twentieth century, but, in heavily German Wisconsin, the state legislature passed one as early as 1890.³⁸⁴ Known as the "Bennett Law," it required children between ages seven and fourteen to attend a school in their district, prescribed a curriculum, required teaching in the English language, and set criminal fines for non-compliance.³⁸⁵ The legislation effectively prevented many parents from sending their children to religious schools, since they were often located outside the district where the family lived. The mandate requiring instruction in English also undercut efforts by Lutherans and Catholics to maintain their heritage.³⁸⁶

Catholics and Lutherans protested such regulations vociferously. In Milwaukee, they were successful in replacing the Republican Mayor with a Democratic candidate who ran primarily against the law.³⁸⁷ Two years later, the Republican Governor who supported the Bennett Law also lost his seat, and a new slate of state legislators repealed the law.³⁸⁸ In this respect, the dispute in Wisconsin resembled the dispute in New York City; religious groups opposed to the Protestant-dominated common schools used the political process to effect change. Notably, in Wisconsin, Catholics allied themselves with Protestant Lutherans to protect their rights to maintain independent "sectarian" religious schools. In New York, Catholics had struggled to obtain public financing without the assistance of allies. But, in another respect, the incidents were very different. In his attack on the funding of the New York common schools, Bishop Hughes had focused in large part on the anti-Catholic character of the curriculum.³⁸⁹ His aim was in part to show that the education in the common schools were sectarian, and convince the Common Council that, out of fairness, it should fund the sectarian Catholic schools as well.³⁹⁰ In contrast, the arguments of the Catholic leadership in

384. See Hunt, *supra* note 231, at 70.

385. Hunt, *supra* note 231, at 70.

386. *Id.* at 70-71.

387. *Id.* at 74-75.

388. *Id.* at 82.

389. KAESTLE, *supra* note 44, at 163.

390. DELFATTORE, *supra* note 336, at 16-17.

Wisconsin during the Bennett Law conflict focused on parental rights.³⁹¹ In their 1890 "Sapientiae Christianae," the three Catholic bishops of Wisconsin argued that "theirs was not a mere political protest, since the Bennett Law violated rights of parent and church in education. . . . [The law] was 'unjust' because it interfered with the 'sacred, inalienable rights of parents' in education."³⁹²

As the Wisconsin bishops presented it, the parental right to educate one's children was itself a form of religious liberty. The bishops understood—as Catholic leadership elsewhere in the country also had—that Catholic education was central to the survival of the church in America.³⁹³ Catholic schooling would produce Catholic adults. Because religious inculcation was the primary means of ensuring the well being and future of the church, a parent who chose to educate her child in a religious school was herself engaging in religious conduct.³⁹⁴ It was conduct, moreover, that received sanction from church leadership at the highest level.³⁹⁵ In 1884, American bishops at the Third Plenary Council had stated that all Catholic parents were "bound" to send their children to Catholic school.³⁹⁶ Shortly afterwards, in January 1890, Pope Leo XIII issued an encyclical stating that the church was "absolutely oppose[d]" to the enrollment of children in the "impious" schools. Parents,

391. Hunt, *supra* note 231 at 71–73, 76.

392. *Id.* at 73 (quoting HARRY T. HEMING, *THE CATHOLIC CHURCH IN WISCONSIN* 283–86 (1896)).

393. *Id.* at 85 (1981); see also WALCH, *supra* note 253, at 40 ("[T]he clergy persisted in establishing parish schools no matter what the cost because the very existence of the church in America depended on these institutions to protect future generations.").

394. See Hunt, *supra* note 231, at 73 (noting that the parental obligation to provide a Catholic education stemmed from divine law).

395. This is a crucial point. Contrary to Noah Feldman's claim, when Catholic parents claimed that being forced to send their children to public schools violated their parental rights, they were not always making an argument that derived entirely from the Protestant notion of "liberty of conscience." See *DIVIDED BY GOD*, *supra* note 55, at 65. While some Catholics did claim that mandatory attendance laws violated their liberty of conscience (a Protestant notion), others instead claimed that such laws required them to violate definitive pronouncements from the Catholic hierarchy that Catholics must send their children to Catholic schools. The source of the "right" in the latter case was not the protection afforded the liberty of conscience, but the protection afforded religious conduct in general. See Hunt, *supra* note 231, at 73.

396. Thomas C. Hunt & Norlene M. Kunkel, *Catholic Schools: The Nation's Largest Alternative School System*, in *RELIGIOUS SCHOOLING IN AMERICA* 1, 6 (James C. Harper & Thomas C. Hunt, eds., 1984) (quoting the *Instruction of the Congregation of Propaganda de Fide*, in *CATHOLIC EDUCATION IN AMERICA: A DOCUMENTARY HISTORY* 92 (Neil G. McCluskey ed., 1964)).

"by God-given right, have the duty to educate their children in accordance with the 'principles of Christian morality.'" ³⁹⁷ Writing the same year, the Wisconsin bishops repeated that the right to control education had its source in "natural and divine law," and urged that the state of Wisconsin had no "right" to compel students to attend the common schools.³⁹⁸ Nor was this claim limited to Catholic leadership. Catholic newspapers repeatedly asserted that the Bennett Law infringed parental rights.³⁹⁹

Although the Bennett Law crisis was resolved politically, the assertion that compulsory attendance violated a religious right of parents to educate their children was an important development. In part, this fueled old fears that Catholics would take orders from Rome and undermine the country. But the rights claim was also being made elsewhere, and in some cases it evidenced an increasing sensitivity to the sectarianism of the public schools and the legitimacy of Catholic objections.⁴⁰⁰ For example, as early as 1876, Presbyterian minister Samuel Thayer Spear argued that Protestants urging prayer in schools "*substantially ask for themselves in respect to the public schools what they deny Catholics.*"

"King James's version is all very well for *them*," Spear wrote, "since they are agreed in accepting it; but it is not so for these other parties, who are taxed in common with them for the support of public schools, and who under our theory of government have just as many and just as sacred rights as they have in these schools."⁴⁰¹

This transformation was felt primarily in state courts, where in the late nineteenth century suits over the King James Bible began to have success.⁴⁰²

One early case was *Board of Education v. Minor*, in which the Ohio Supreme Court reversed a decision by a lower court striking a board of education policy that prohibited religious instruction and Bible reading in Cincinnati common schools.⁴⁰³

397. Hunt, *supra* note 231, at 72.

398. *Id.* at 73.

399. *Id.* at 71.

400. See DELFATTORE, *supra* note 336 at 52–54.

401. DELFATTORE, *supra* note 336, at 52–53 (quoting THAYER SPEAR, RELIGION AND THE STATE 41 (1876)).

402. *Id.*; see also Thomas C. Hunt, *The Edgerton Bible Decision: The End of an Era*, 67 CATH. HIST. REV. 589 (1981); TYACK, JAMES & BENAVIDES, *supra* note 41, at 163.

403. Bd. of Educ. v. Minor, 23 Ohio St. 211, 243 (1872).

The dispute before the court had begun much like those in New York and Philadelphia thirty years earlier: Catholic leaders requested public funds for Catholic schools. When the Cincinnati Board of Education responded that it would not fund sectarian education, Catholics retorted that a common school curriculum including the King James Bible was also sectarian. Unlike the New York dispute, however, Cincinnati Catholics were accompanied in their resistance by other religious minorities, and the Board of Education, unlike the New York Public School Society and New York Common Council, was sensitive to the unfairness of funding Protestant education alone.⁴⁰⁴ In response to the request, the Board of Education passed a resolution prohibiting religious instruction and the reading of religious books, "including the Holy Bible," in city schools.⁴⁰⁵

Protestants sued. They argued that a clause in the Ohio Constitution declaring "religion, morality and knowledge" to be essential to good government required that Ohio schools provide religious instruction.⁴⁰⁶ In an opinion by Justice Welch, the Ohio Supreme Court rejected the argument. It found that the constitution did not specify *what* religious or moral truths had to be taught, and thus left this to legislative determination, as it did the duty to provide for such an education.⁴⁰⁷ This point resolved the case. Nevertheless, the court continued at length, doing so in order to dispel the threat posed by the dispute to the "harmonious working of the state government."⁴⁰⁸ It is true, the court supposed, that the best religion is essential to the best government. But how should the best religion be secured?

I answer, it can best be secured by adopting the doctrine of this 7th section in our own bill of rights, and which I summarize in two words, by calling it the doctrine of 'hands off.' . . . It is the true republican doctrine. It is simple and easily understood. It means a free conflict of opinions as to things divine; and it means masterly inactivity on the part of the state, except for the purpose of keeping the conflict free, and preventing the violation of private rights or of the public

404. DELFATTORE, *supra* note 336, at 56.

405. *Id.* at 57 (quoting *Bd. of Educ. v. Minor*, 23 Ohio St. 211, 211 (Ohio 1872)).

406. *Minor*, 23 Ohio St. at 243.

407. *Id.* at 244, 245.

408. *Id.* at 245.

peace. . . . It means that a man's right to his own religious convictions, and to impart them to his own children, and his and their right to engage, in conformity thereto, in harmless acts of worship toward the Almighty, are as sacred in the eye of the law as his rights of person or property, and that although in the minority, he shall be protected in the full and unrestricted enjoyment thereof.⁴⁰⁹

A number of things are remarkable about this unusual opinion, but two are important here. First, though dicta, Justice Welch clearly recognizes a parental free exercise right against interference with religious education. Unlike the right asserted in the case of the Bennett Law, this right has a basis in the Ohio Constitution and presumably affords a remedy to unlawful state regulation.⁴¹⁰ This view gives a legal dimension to conflicts between the state and religious schools, which church leadership had previously sought to solve through political means. Moreover, while in the twentieth century Bible reading in public schools has been found to violate the Establishment Clause, the Ohio Supreme Court in 1872 appears to regard it as implicating both establishment-like and free exercise-like rights.⁴¹¹

Second, Justice Welch's comments have a Jeffersonian feel to them. Jefferson believed that state-administered free schooling and religious liberty went hand-in-hand.⁴¹² In this respect, he differed from most common school reformers in the 1830s and 1840s, who understood the inculcation of Protestant morals to be an important goal of common schooling. A similar concern for the importance of religion to the republic led Justice Welch to a conclusion much closer to Jefferson's than Horace Mann's. In Welch's view, to arrive at the "best religion," one should enable "a free conflict of opinions as to things divine," instead of inculcating one doctrine at the expense of another.⁴¹³ This government is best served by a school that prepares students to choose freely between religions on the open market.⁴¹⁴

409. *Id.* at 250–51.

410. *Id.* at 245.

411. *Id.* at 250–51.

412. *See supra* note 280.

413. *See Minor*, 23 Ohio St. at 250–51.

414. *See id.*

V. CONCLUSION

The Introduction to this article makes two claims about the history of American education. First, it asserts that the history of education shows that parents have long ceded control to the state in regulating the education—even the religious education—of children.⁴¹⁵ Second, it asserts that the history of education is problematic for proponents of what I called “equality theories” and “liberty theories” of the First Amendment’s Religion Clauses.⁴¹⁶ I would now like to return to these points and argue that the history discussed above has borne out the claims of the Introduction. I begin with the second point.

A. Equality Theories and Liberty Theories

An equality theory of the First Amendment argues that the purpose of the Religion Clauses is to protect political equality, in particular, to protect members of minority religions from members of majority religions. In contrast, according to a liberty theory of the First Amendment, the purpose of the Religion Clauses is to protect liberty of conscience. What relevance does the history of educational practices have for either theory of religious liberty?

1. The problem: the republican character of early education

One feature of each of the historical periods discussed above—colonization, founding, and antebellum—is that state interests in schooling were asserted in response to the perceived threat of instability or collapse. The earliest colonists in Massachusetts Bay faced the threat of collapse quite literally, and in response, the colonial government asserted new powers over educational practices that had hitherto taken place, for the most part, inside the home.⁴¹⁷ Two hundred years later, the founders were themselves occupied with the prospect of collapse of the new federal government. They sought to introduce a common school system, in part to homogenize the citizenry and to instill a sense of public virtue, both of which

415. See *supra* Part I.A.

416. See *supra* Part I.B.

417. See *supra* Part II.A. (discussing the changes in education that arose when settlers arrived in America).

they believed were necessary for the survival of so large a republic.⁴¹⁸ Finally, the common school reformers responded to the rapid influx of diverse immigrants and the city instability with a proposed common school system, which would Americanize immigrant Catholics by instructing them in core Protestant morals.⁴¹⁹ In all three cases, reformers believed that, through formal education, the state could shape individuals and thereby avoid collapse.

In both the founding and antebellum periods, proponents of universal education sought to offer *moral* education in the schools. As they saw it, only moral instruction could shape individual conduct in the ways necessary to avoid instability or collapse; thus, moral education was necessary for formal education to achieve its purpose.⁴²⁰ What “moral” education entailed, however, underwent a transformation. During the common school movement, moral instruction took on a more overtly doctrinal connotation, as reformers focused on the children of Catholic immigrants.⁴²¹ Setting this difference aside, formal schooling in both periods was clearly designed to exert moral influence over individuals—to shape and to fashion their core beliefs and conduct—not to respect differences and leave them untouched.⁴²² This is what I have referred to as the *republican* nature of early American education.⁴²³

On its face, this aspect of early education is at odds with the

418. See *supra* Part II.B.1. & 2. (discussing concerns that citizens in a republic would not obey the laws, and that a large republic would not be homogenous enough to survive).

419. KAESTLE, *supra* note 44, at 163; see *supra* Part III.B.1. & 2.

420. See *DIVIDED BY GOD*, *supra* note 55, at 60 (describing this reasoning in the case of the common school movement). The same reasoning was evident elsewhere. See, e.g., WOOD, *supra* note 105, at 120 (describing the view of the founders that education promoted virtue, which was necessary for republican government).

421. See *THE NATIONAL EXPERIENCE*, *supra* note 53, at 140 (describing Mann’s view of the appropriate common school curriculum as close to the “evangelical conceptions of the day”). Compare this description to the views of the founders about the significance of formal education, which appear much more *civic* in nature. See Part II.B. (describing these views).

422. For an example of this attitude in the founding period, see *supra* note 108 and accompanying text. The church charity schools provide another powerful example, there designed to prevent children from remaining impoverished. See Part II.C. The attitude was widespread in the era of common school reform.

423. For discussion of the meaning of “republican” as used here, see *supra* note 82; see *supra* Part II.B.1. & 2. On this account, republicanism emphasized the public good and the necessity of individual virtue for government by the people, in contrast to an emphasis on individual rights against the majority. See, e.g., WOOD, *supra* note 105, at 53–54, 61, 65–66.

assertion that we have long protected the liberty of conscience or the equality of members of minority religions, and that this should form the basis of our interpretation of the Religion Clauses.⁴²⁴ How could a liberty or equality theorist more fully account for the religious character of our educational practices? What changes might the history of education require in such theories?

2. Response one: the common schools were non-sectarian

One possible response is that no changes are required. For example, a liberty theorist could argue that the common schools only functioned to impose on children the morals held in common by most members of society. While early school administrators drew on Protestant sources for those morals, this derivation does not, on its own, make them Protestant. They might have been derived from other sources as well. After all, how “sectarian” are the values of hard work, self-control, modesty, honesty, frugality, and respect for private property and traditional family roles—all emphasized by early curricular materials?⁴²⁵ Horace Mann made this “non-sectarian” argument in support of the common schools in response to objections from members of minority Protestant denominations.⁴²⁶ Noah Feldman has recently taken a similar position, suggesting that the republican character of the common school curriculum—its nativist and anti-Catholic aspects—emerged only after immigrant Catholics began to object to the use of the King James Bible.⁴²⁷ We can call this response the “non-sectarian” response, since it emphasizes the shared, non-sectarian character of religious education in the common schools.⁴²⁸

The non-sectarian response is unsatisfying for several reasons. First, it is in tension with much of the available historical scholarship, which suggests—contrary to Feldman’s

424. NUSSBAUM, *supra* note 55, at 2–5; DIVIDED BY GOD, *supra* note 55, at 27.

425. See HOWE, *supra* note 54, at 453 (noting the argument that “the common school embodied a common ideology”); KAESTLE, *supra* note 44, at 80–83.

426. DIVIDED BY GOD, *supra* note 55, at 61–62.

427. *Id.* at 64–65.

428. The response is not limited to the liberty theorist; the same argument supports the equality theorist as well. For if a “non-sectarian” curriculum sufficed to protect the conscience of minority believers, it would *ipso facto* be unlikely to promote majority believers at the expense of minority believers.

view—that the Protestant curricula of the common schools was laced with anti-Catholicism from the beginning.⁴²⁹ In Kaestle's interpretation, the superiority of Protestantism to other denominations was intrinsic to the Protestant worldview of the school reformers of the early nineteenth century.⁴³⁰ In other words, anti-Catholicism was not a later addition to the self-understanding of Protestant reformers. On the contrary, along with the millennialism fashionable at the time, the sense of Protestant superiority accounted for much of the fervor with which Protestants organized in support of charity schools and then common schools.⁴³¹ Feldman and other proponents of the non-sectarian response therefore must do more to provide it with an adequate historical foundation.

Second, the non-sectarian response is internally inconsistent. To see how, consider how Horace Mann and other reformers used the "non-sectarian" argument. Mann used this argument to encourage members of minority Protestant denominations to support a common school system with a "pan-Protestant" curriculum.⁴³² We must assume that Protestants who gave their support saw a need for universal, systematic instruction in non-sectarian Protestant morals. But this raises an important question. What need could there have been for such instruction, if the morals it imparted were already universally shared by the population? Such a system could affect no *moral* change, since the children it taught would have been instructed in the same morals by their parents. Such a system would have been regarded by the public of Mann's time as woefully inadequate. That public was anxious about the rise of immigration in the cities and believed formal schooling should address it.⁴³³ If Mann's common schools offered only an innocuous, truly universal education, there would have been no reason for the public to support them.

429. See, e.g., KAESTLE, *supra* note 44, at 92–93; see *supra* Part III.B. and the sources cited therein.

430. See *id.* at 92–93 ("English Protestants had considered themselves the defenders of the faith ever since their split with Rome, and the American Puritans, in turn, believed that they had salvaged what was best in English Protestantism. . . . They associated Protestant Christianity with republicanism, with economic progress, and with virtue. . . . The tendency of the Roman Catholic religion, in contrast, 'was toward degeneracy and ruin' . . .").

431. See *id.*

432. See, e.g., DIVIDED BY GOD, *supra* note 55, at 61–62.

433. See KAESTLE, *supra* note 44, at 63, 69 (describing the growth of cities and the anxiety it triggered).

3. Response two: early education was viewed differently than the practice of religion

How else, then, might a liberty or equality theorist account for the religious character of our educational practices? The most obvious way to preserve the liberty and equality theories in light of the history of education is to narrow their *scope*. For example, a liberty theorist could argue that, while a republican attitude towards religious differences prevailed in school, a very different attitude prevailed in political society at large. There is some support for this view. First, primary and secondary schools educate people who have not yet reached the age of political majority, and therefore may not enjoy full religious liberties.⁴³⁴ Second, the Religion Clauses protect individuals from government action, not from private conduct.⁴³⁵ Similarly, liberty of conscience and political equality are *political* ideals, not norms of private conduct. Early schools arguably belonged to the sphere of private conduct, as an extension of the activities of the family and the church.⁴³⁶

While this response is somewhat attractive, fully substantiating it would require scholarly work beyond that any liberty or equality theorist has offered to date. For example, proponents would have to show what attitudes prevailed about the public or private character of school at the time of the founding and at the time of the common school movement. Moreover, the history discussed above suggests that American leaders were long aware of the vital *political* significance of schools. One could interpret Jefferson, Rush and Mann's state school plans as plans to transform schools into a part of political society, or argue that, properly understood, schools were already a crucial part of political society.⁴³⁷ If that is correct, then why a different attitude towards religious liberty should be taken in the schools than in other areas of political

434. *But see* *Yoder*, 406 U.S. at 243–44 (Douglas, J., dissenting).

435. *See, e.g.*, 16A AM. JUR. 2D *Constitutional Law* § 408.

436. *See supra* Part II.A. for a discussion of this point.

437. *See* WOOD, *supra* note 105, at 120 (noting the central role some founders attributed to education in preserving republican government). As the discussion in Part II.B. makes clear, the founders regarded education as vitally important to the survival of the republic; as such, they could reasonably be viewed as a branch of government. *See also* TYACK, JAMES & BENAVIDES, *supra* note 41, at 43–76 (discussing the rise of state regulation of schooling and characterizing education as the fourth branch of state government).

life is unclear.

4. Response three: we have sometimes subordinated religious liberty to other values

A third response to the history of education is also possible. This response is that liberty of conscience and political equality are not overriding or absolute values. While we have long valued the liberty of conscience, and the political equality of members of different religions, we have also long subordinated these values to others, when the facts of a particular situation suggest it is necessary. As the common school movement shows, we have impinged on the liberty of conscience and individuals' genuinely held religious beliefs, and we have expressed preference for certain faiths over others. We do not have to regard all these cases as failures, although in some cases we clearly failed to act as we should have acted. In other cases, we simply judged that other values were more important. If this is correct, then neither the liberty theory nor the equality theory fully explains our practices, since those practices are more complex than either theory admits.

B. Weighing Parental and State Interests in Education

We can begin to reflect on what the history of education reveals about parental interests by reviewing the wide variety of interests that have appeared. Educational practices in the early republic—predominantly, the district system—gave parents and local school committees tremendous discretion. Yet this discretion is best understood as something short of legal authority, for it was not often politically challenged and was not often conceived as legally actionable.⁴³⁸ Parental discretion under the district system was, in effect, the de facto control of a very modest, heavily instrumental undertaking: learning to read from the Bible, learning to sign one's name, and learning basic rules of arithmetic. This was all most rural Americans wanted, and this is all they demanded of schools. Where early school reform failed, as it did in Pennsylvania and in Virginia, it was not because reformers met a parentry jealously guarding

438. There was very little litigation over education in the early republic. TYACK, JAMES & BENAVIDES, *supra* note 41, at 64–65. The first major parent-school disputes over control that ended up in *court* typically centered on school discipline, not religion. See KAESTLE, *supra* note 44, at 160–61.

its "rights," but because no need was seen to fund a free state-administered school system, and because Americans were inherently suspicious of state taxation and regulation.⁴³⁹ Thus while it should not be overlooked that in the early district system, parents possessed almost full control over schools, this fact does not evidence a long-standing assertion by parents that they had such control by *right*.⁴⁴⁰

The first well-defined parental interests emerge later, in the political conflicts over educational reform during the common school movement. The church charity schools, from which the common schools sprung in the cities, were designed precisely to *interfere* with parent-child relationships by engaging in religious and moral instruction. In the view of the societies that ran them, such interference was necessary to prevent an impoverished parent from transmitting his bad character—and thus, his poverty—to the next generation.⁴⁴¹ Some common school reformers took a similar attitude towards the children of immigrants.⁴⁴² This later precipitated a political struggle between immigrant parents and the common schools over the content of instruction. Still, for most of the 19th century, the warring interests were *political*. Neither reformers nor parents immediately sought to ground their position in state or federal constitutions; instead, they resolved disputes at the ballot box, where majority ruled.⁴⁴³ In New York City, this meant that the Protestants came out on top; in Wisconsin, the German Catholics and Lutherans prevailed. Because the process was political, the nature of the parental interest during this time was importantly limited: it was subject to, and confined by, the democratic process.

The assertion of a proper parental *right* to religiously educate one's child emerged only near the end of the struggle over common schools, and was at first not well-defined. During the Bennett Law controversy, church authorities located the source for parental rights in divine law, in particular, in the

439. KAESTLE, *supra* note 44, at 9; THE NATIONAL EXPERIENCE, *supra* note 53, at 108 (describing the opponents to early reform plans).

440. See also *Garvin Cty*, 103 P. at 579 (noting that state regulations can narrow the common-law right of parents to control the education of children). There was relatively little *constitutional* litigation about parental rights until the twentieth century. See *supra* note 41.

441. See *supra* Part II.C.

442. KAESTLE, *supra* note 44, at 163; see *supra* Part III.B.

443. TYACK, JAMES & BENAVIDES, *supra* note 41, at 162.

duty God gave parents to ensure that their children were instructed in Catholicism.⁴⁴⁴ Since the survival of Catholicism depended on this education, the right asserted was essentially a right to a particular kind of religious conduct.⁴⁴⁵ But not all assertions of a parental right took this form. Some assertions of parental rights were based on the common-law right of parents to direct the upbringing of their children,⁴⁴⁶ which the state could not arbitrarily impinge.⁴⁴⁷ A variety of parental interests were at play.

State interests in education also took a variety of forms, shaped by the various local and state educational practices. For example, several notable founders took an aggressive view of state interests in free schooling. They believed a strong primary education was necessary to the survival of republican government, to ensure the obedience of the people, good leadership, and the mutual understanding of citizens.⁴⁴⁸ For the most part, however, reform-minded founders were unable to achieve the school reform they hoped for.⁴⁴⁹ Formal schooling in the early republic remained, for the most part, a local undertaking, although it was funded by a combination of tuition, donations, and public monies.⁴⁵⁰ Comprehensive reform and state regulation of schools came later, during the common school movement of the nineteenth century.

It is this period that is most crucial to understanding the significance of state regulation of education. Common school reforms reflected a genuine recognition of the importance of universal school attendance, a standardized curriculum, the use of qualified teachers, and adequate funding.⁴⁵¹ Changes in these areas had instrumental value, if nothing else; they

444. Hunt, *supra* note 231, at 73.

445. See *id.*; *Prince*, 321 U.S. at 164 (acknowledging this characterization).

446. See O'Hara, *supra* note 16, at 5, 5 n.1 (citing *Garvin Cty*, 103 P. at 578).

447. *Meyer*, 262 U.S. at 403. As another variation, the appellant in *Prince* argued in the alternative that the state's regulation restricted her child's right to practice religion. *Prince*, 321 U.S. at 164 ("Thus, two claimed liberties are at stake. One is the parent's, to bring up the child in the way he should go, which for the appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these . . .").

448. See *supra* Part II.B.

449. See *supra* Part II.B. (describing the rejection of reform plans in Virginia and Pennsylvania).

450. See *supra* notes 190, 193 and accompanying text.

451. See KAESTLE, *supra* note 44, at 106 (detailing the defects of the previous district system dominant in the North).

improved the quality of schooling for pupils.⁴⁵² Yet this is, at best, only a partial picture of the school reform movement. The movement reflected the influence of other concerns as well.⁴⁵³ Viewed from one angle, these concerns centered around a concern to ensure social and political stability in the face of rapid demographic and economic changes.⁴⁵⁴ Viewed from another angle, however, the concerns were less innocuous. Indeed, they were invidious: reformers sought to replace Catholicism with Protestantism, a religion they regarded as naturally superior,⁴⁵⁵ and to Americanize newly arrived immigrants, particularly the Irish.⁴⁵⁶ While the difference between these concerns is easy to mark conceptually, it is often hard to mark practically. Indeed, it seems likely that many common school reformers were moved by both innocuous and invidious concerns.⁴⁵⁷

This history suggests several legal conclusions. First, it is inaccurate to juxtapose “traditional” parental rights with “newfound” state powers.⁴⁵⁸ In terms of the history of education, parents have only recently asserted a constitutionally significant “right” against the state power to regulate the education of their children, and they have long ceded some control over education to the state—including control over religious education. This suggests that it may be a mistake to apply a strict scrutiny standard to state regulations burdening parental rights.⁴⁵⁹ In the First Amendment Free Speech context, courts do not apply strict scrutiny where speech has historically been unprotected.⁴⁶⁰ More significantly, in the Free Exercise context, courts apply *rational basis review*

452. *Id.* at 135 (“Normal schools, education journals, professional supervision, uniform textbooks, higher teacher wages, and other antebellum reforms were designed to bring a measure of consistency and quality to a collection of local institutions that the reformers considered uneven and largely inadequate.”).

453. *See generally id.* at chp 5.

454. *See id.* at 69.

455. *See id.* at 92–93.

456. *See supra* note 360 and accompanying text.

457. *See* KAESTLE, *supra* note 44, at 75 (describing the reformers).

458. *See Yoder*, 402 U.S. at 213–14.

459. *See id.* at 215 (explaining the level of scrutiny).

460. For example, consider regulations of the so-called “major” and “minor” “jurisdictions of censorship” under the Free Speech Clause, such as incitement or obscenity. *See* *Miller v. California*, 413 U.S. 15, 18–19 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (incitement). The “major” and “minor” “jurisdictions of censorship” terminology comes from HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988).

to challenges of facially neutral, generally applicable laws; the only exception is a "hybrid" claim, such as one resting on both Free Exercise and parental rights.⁴⁶¹ However, given what we now know about parental rights, the application of strict scrutiny to hybrid claims makes little sense. Parental educational rights have long been subject to state interference. For many years, it was irrelevant whether religious education was at issue. "Hybridization" did not matter.⁴⁶² Moreover, where the Supreme Court has struck down a regulation *purely* because it infringed parental rights, it has done so because the regulation was unreasonable or the end not "within the competency of the state."⁴⁶³ Why should two rights (Free Exercise and parental rights), both of which the state may infringe if it can satisfy rational basis review, suddenly require strict scrutiny when combined?

Some form of heightened scrutiny may be appropriate in light of the multiple interests at stake. Some form of heightened scrutiny may also be necessary at the *balancing* stage of a claim that the state violated a parent's right to direct her child's religious education. This is because of the problem discussed above, namely, that historically the interests asserted by the state in regulating education have had a janus-faced character to them. Heightened scrutiny may be necessary to determine whether the state action in question is innocuous or invidious. This would presumably require some examination of the record. Under rational basis review, however, a hypothetical legitimate state interest would suffice to satisfy a constitutional challenge. The history of state regulation of education suggests that courts should require something more.

461. *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990) (discussing *Yoder*).

462. Notably, the Supreme Court stated in *Prince* that a parental right claim (based in due process) "extends no further than that to freedom of religion, since in the circumstances all that is comprehended in the former is included in the latter." *Prince*, 321 U.S. at 164 n.8.

463. *Pierce*, 268 U.S. at 535 (applying the rule that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State."); *Meyer*, 262 U.S. at 403.